(25,506)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 676.

HE POSTAL TELEGRAPH-CABLE COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEWPORT, KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

DD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 9, 1917.

1 THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, Kentucky, on the 12th Day of October, 1914.

POSTAL TELEGRAPH CABLE COMPANY, Appellant,
vs.
CITY OF NEWPORT, Appellee.

Be it remembered that on the 23rd day of March, 1914, the appellant by its attorney filed in the office of the Clerk of the Court of Appeals of Kentucky, a transcript of the record, and which is in words and figures as follows:

2 Court of Appeals of Kentucky.

POSTAL TELEGRAPH CABLE COMPANY, a Corporation Organized under the Laws of the State of Kentucky, Appellant,
vs.
THE CITY OF NEWPORT, Appellee.

Appeal from a Judgment of Campbell Circuit Court.

An appeal from a judgment of the Campbell Circuit Court, rendered December ninth, 1913, to be found on page 56 of the transcript herein.

No summons necessary.

No warning order necessary.

Attorneys for Appellant: Waite & Schindel, Cincinnati,
3 Ohio, & Thos. P. Carothers, Newport, Ky.

Attorney for Appellee: Ottq Wolff, Newport, Ky.

Court of Appeals of Kentucky.

POSTAL TELEGRAPH-CABLE COMPANY OF KY., Appellant,
vs.
THE CITY OF NEWPORT, Appellee.

Agreement.

The words "New York" having been used in the title of the appellant instead of the word "Kentucky" in the statement of the case, by inadvertence, and the real title and real property in interest being The Postal Telegraph Cable Company of Kentucky, it being the defendant in the action below, it is agreed by the parties that the
4 word "Kentucky" shall be substituted for the same and this

cause be adjudicated as and of the Postal Telegraph Company of Kentucky as party appellant.

MORRISON R. WAITE,
JOHN R. SCHINDEL,
THOS. P. CAROTHERS,
Attorneys for Appellant.
OTTO WOLFF,
Attorney for Appellee.

5 Campbell Circuit Court, Campbell County, Kentucky.

No. 15602.

CITY OF NEWPORT, KENTUCKY, Plaintiff,
vs.
POSTAL TELEGRAPH CABLE COMPANY, a Corporation Organized under the Laws of the State of New York, Defendant.

Petition.

The plaintiff, the City of Newport, says that the defendant, the Postal Telegraph Cable Company is a foreign corporation, created and organized under the laws of the State of New York, for the purpose of the reception and transmission of messages by means
6 of a system of telegraphy connecting said city with other Cities and Towns in this State and various other States of the United States; that it is empowered to contract and be contracted with, sue and be sued by its corporate name, the "Postal Telegraph Cable Company"; that on the — day of December, 1895, the said defendant secured from said plaintiff, by an ordinance duly passed by the General Council of said City on said day, and entitled, "An ordinance granting to the Postal Telegraph Cable Company, the right and privilege of erecting poles and stretching wires through the streets and alleys of the City of Newport, Kentucky," the right and privilege to erect its poles and string its wires in and over
7 the streets and alleys of the City of Newport, and establish, operate and maintain a telegraph system therein; a duly certified copy of said ordinance is filed herewith as part hereof and made a part hereof as fully as if copied herein, and marked exhibit "A": That the first section of said ordinance granting said right and privilege reads as follows; to-wit;—"That the right and privilege of erecting poles and stretching wires in and over the streets and alleys of the City of Newport, Kentucky, necessary to the establishment, operation and maintenance of a telegraph system connecting said system with the other Towns and Cities is hereby granted to the Postal Telegraph Cable Company and its successors, subject to the limitations and restrictions hereinafter set out and provided."
8 Plaintiff further says that in consideration of said right and privilege to so occupy and use the streets and alleys of plaintiff as aforesaid, the said defendant promised, agreed and bound itself to pay to the said plaintiff the sum of One Hundred ($100.00)

dollars per annum by section seven (7) of said ordinance, which reads as follows; to-wit: "The said Postal Telegraph Cable Company, shall pay to the City of Newport, a special license tax of One Hundred ($100.00) Dollars per annum." Plaintiff further says that immediately after the passage of said ordinance, and by virtue of and
9 in pursuance thereto, said defendant began the erection of its poles and the stringing of its wires in and over the streets and alleys of the said City of Newport, and established, operated and maintained its said telegraph system therein, which system ever since said day, has been and is now so established, operated and maintained, and for the purpose aforesaid; that the said defendant ever since the passage of said ordinance has been and is now enjoying all the rights and privileges as granted to it under same, by said plaintiff and that said defendant, thereby accepted and did accept, said ordinance on the — day of December, 1895, and it thereby became a binding contract between the said plaintiff and defendant from and after said day.

Pr. 2. Plaintiff further states that by the terms of said
10 ordinance and contract there became due and payable to the plaintiff herein by said defendant on the — day of December, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907 and 1908, the sum of One Hundred ($100.00) Dollars for each of the aforesaid years ending with the — day of December in each of said years, but that the said defendant in total disregard of its said contract, and in violation of same, failed and refused to pay the whole or any part thereof to plaintiff, although often requested to do so, and still so fails and refuses.

Wherefore, plaintiff prays judgment against the defendant,
11 The Postal Telegraph Cable Company for the sum of $100.00 with interest from the — day of December, for each of the years from 1899 to 1908, inclusive, until paid, and for its cost and for all other proper relief.

COURTLAND T. BAKER,
Attorney for Plaintiff.

The affiant, Edward L. Krieger, says that he is the Mayor of the City of Newport, and that the allegations of the foregoing are true, as he believes.

EDWARD L. KRIEGER.

Subscribed and sworn to before me this the 11th day of May, 1908.
HUBBARD SCHWARTZ, *Clerk,*
By W. A. SCHWARTZ, *D. C.*

12 And thereafter on the same day and date, the following summons was issued, which is in words and figures as follows, to-wit:

Campbell Circuit Court.

THE COMMONWEALTH OF KENTUCKY:

To the Sheriff of Campbell County:

You are hereby commanded to summon Postal Telegraph Cable Company, a corporation organized under the laws of the State of New York, to answer a petition filed against it, by City of Newport, Ky., in the Campbell Circuit Court, twenty days after the service of this summons, on it on penalty of the petition being taken for confessed, or being proceeded against for contempt in failing to do so, and you will make due return hereof.

13 Witness, Hubbard Schwartz, Clerk of said Court at Newport, this 26th day of May, 1908.

HUBBARD SCHWARTZ, *Clerk,*
By —— ——, *Deputy Clerk.*

June 4th, 1908, *Sheriff's Return.*

Executed the above summons this 26th day of May, 1908, on the Postal Telegraph Cable Company, by delivering to A. E. Poe, a copy thereof, he being the manager and only officer of said Company found in my county.

JOHN P. NAGEL, *Sheriff,*
By CHAS. H. DAVIS, *D. S.*

Fee 60c.

14 And thereafter on the 15th day of June, 1908, the following motion was filed, which is in words and figures as follows, to-wit:

Motion.

Now comes the defendant and enters its appearance specially for the purpose of this motion only, and for no other purpose, and without entering its appearance generally to the action herein, and moves the Court to quash, set aside and hold for naught the service of Summons and the return thereof, purporting to show service on A. E. Poe, for the following reasons:

1st. Because this defendant at the time of filing said peti-
15 tion, at the time of the service of said summons and at all times since, was not subject to the jurisdiction of this court, was not doing or carrying on business in the State of Kentucky and had no office nor any property within said State.

2nd. Because A. E. Poe, to whom said return of summons purports to show was delivered a copy of said summons and on whom according to said return, service of summons was attempted to be made herein, is not now and was not at the time of the attempted service of said summons, and never has been, either an officer, agent, manager or employee of the defendant herein, or a person in charge of any business in this State for said defendant corporation; and be-

cause further, Claude Poe, to whom was actually delivered
16 a copy of the summons by the Deputy Sheriff in attempting to make service of said summons is not now, and was not at the time of said attempted service of summons, and never has been, either an officer, agent, manager or employee of the defendant herein, or a person in charge of any business in this State for said defendant corporation.

3rd. Because this defendant at the time of the institution of this action and at the time of the service of the summons herein, and at all times since, had no agent, officer or manager within the State of Kentucky, nor was there at either of said times or since, a person in charge of any business in the State of Kentucky for said defendant corporation.

17 WARD W. PATTERSON,
MORISON L. WAITE,
Attorneys for Defendant.

And thereafter on the same day and date, the following affidavit in support of motion, was filed, which is in words and figures as follows, to-wit:

Affidavit in Support of Motion.

Claude Poe, being first duly sworn, says that he is the person to whom the Deputy Sheriff delivered a copy of the summons in this case in attempting to make service of said summons; that he does not know and has never heard of there being a person named A. E. Poe, and that it is a mistake for the return of said summons to show that a copy of said summons was delivered to A. E. Poe, when the fact is that the same was delivered to the affiant.

18 Affiant further says that he is not now, nor was he at any time employed by the defendant, the Postal Telegraph Cable Company, a corporation under the laws of New York; that he has not now, nor has he ever had any relation with that company; that he is not now, nor has he ever been either an agent, officer, manager or Employe of the defendant herein, and he is not now, nor has he ever been in charge of any business in this State for said Defendant corporation.

Further affiant saith not.

CLAUDE POE.

Sworn to before me and subscribed in my presence this — day of June, 1908.

[SEAL.] M. F. DONELAN,
Notary Public.

My Commission expires January 29th, 1910.

19 And thereafter on the 18th day of June, 1908, the following affidavit in support of motion was filed, which is in words and figures as follows, to-wit:

Affidavit in Support of Motion.

STATE OF NEW YORK,
County of New York, ss:

Edward J. Nally, being first duly sworn, deposes and says that he is Vice-President of the defendant in this case, The Postal Telegraph Cable Company, a corporation under the laws of New York; that said defendant is not now, and was not at the time of the institution of this action or at any time since, carrying on, doing or transacting business in this State of Kentucky; that Claude Poe, upon
20 whom affiant is informed *of* summons was attempted to be made in this action, is not now and was not at the time of the institution of this action, or at the time of said attempted service of summons, or at any time since, either an officer, agent, manager or employee of or for the defendant herein; and said Claude Poe is not now, and was not at the time of said attempted service, or at any time since, in charge of any business for the defendant herein in the State of Kentucky.

Affiant further saith not.

EDWARD J. NALLY.

Sworn to before me and subscribed in my presence, this 15th day of June, 1908.

[SEAL.] HENRY A. VAN DER PAAUWERT,
Notary Public, Kings County.

Certificate filed in New York County.

21 STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify that Henry A. Van Der Paauwert, has filed in the Clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Kings with his autograph signature, and was at the time of taking the annexed deposition, duly authorized to take the same, and that I am well acquainted with the handwriting of said Notary Public, and believe that the signature to the annexed certificate is genuine.

22 In testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 16th day of June, 1908.

[SEAL.] PETER J. DOOLING, *Clerk.*

And thereafter on the 20th day of June, 1908, the following order was made, which is in words and figures as follows, to-wit:

Order.

Comes defendant and moves to set aside and quash summons, and

plaintiff objects and cause is continued on motion and objection thereto until Saturday, June 27th, 1908.

And thereafter on the 27th day of June, 1908, the following order was made, which is in words and figures as follows, to-wit:

Order.

Comes defendant and moves to set aside and quash service of Summons, and cause is submitted on motion.

And thereafter on the 21st day of November, 1908, the
23 following order was made which is in words and figures as follows, to-wit:

Order.

Comes plaintiff, and moves for leave to file first amended petition, and has leave so to do and said amended petition is filed.

And thereafter on the same day and date the First Amended Petition referred to in the foregoing order, was filed, which is in words and figures as follows, to-wit:

First Amended Petition.

Par. 1. The Plaintiff, for amendment to the Petition, says that the defendant, the Postal Telegraph Cable Company, is a corporation organized under the laws of the Commonwealth of Kentucky for the purpose of the reception and transmission of messages
24 by means of a system of telegraphy connecting said city with other cities and towns in this State and various other states of the United States; that it is empowered to contract and be contracted with, sue and be sued, by its corporate name "Postal Telegraph Cable Company."

Par. 2. The Plaintiff says that if the Postal Telegraph Cable Company is not incorporated or organized under the laws of the Commonwealth of Kentucky, then Plaintiff says that it has not knowledge nor information sufficient to form a belief concerning the place where the Postal Telegraph Cable Company is organized.

Par. 3. Plaintiff says that the Postal Telegraph Cable Company is an incorporated Company, incorporated and organized
25 under the laws of some state or county unknown to plaintiff.

Wherefore plaintiff prays as heretofore and for all proper relief.

C. T. BAKER,
Attorney for Plaintiff.

The affiant, Edward L. Krieger, says that he is the Mayor of the City of Newport, and that the allegations of the foregoing are true, as he believes.

EDWARD L. KRIEGER.

Subscribed and sworn to before me this 13th day of July, 1908.
HUBBARD SCHWARTZ, *Clerk*,
By W. A. SCHWARTZ, *D. C.*

And thereafter on the 23rd day of November, 1908, the following summons was issued, which is in words and figures as
26 follows to-wit:

THE COMMONWEALTH OF KENTUCKY:

Campbell Circuit Court.

To the Sheriff of Campbell County:

You are hereby commanded to summon Postal Telegraph Cable Company to answer a 1st Amended Petition filed against it by the City of Newport, Kentucky, in the Campbell Circuit Court, twenty days after service of this summons on it, on penalty of the 1st Amended petition being taken for confessed, or being proceeded against for contempt in failing to do so, and you will make due return hereof.

Witness, Hubbard Schwartz, Clerk of said Court, at Newport, this 23rd day of November, 1908.

27 HUBBARD SCHWARTZ, *Clerk*,
By PETER BARDO, Jr., *Deputy Clerk.*

December 9, 1908, *Sheriff's Return.*

Executed the above summons this 9th day of December, 1908, on Postal Telegraph Cable Company be delivering a copy -hereof to Claude Poe, he being agent of the above named Company, and Chief Officer found in my county.

JOHN P. NAGEL, *Sheriff*,
By H. V. GILMORE, *D. S.*

Fee 60c.

And thereafter on the 30th day of December, 1908, the following motion was filed, which is in words and figures as follows, to-wit:

Motion.

Now comes Postal Telegraph Cable Company, a corpora-
28 tion under the laws of the *laws of the* Commonwealth of Kentucky, and, entering its appearance specially for the purpose of this motion only, and for no other purpose, and not entering its appearance generally to the action herein, moves the Court to quash, set aside and hold for naught the service of summons and the return thereof on it in this action, for the following reasons:

1. Because Postal Telegraph Cable Company, a corporation organized under the laws of the Commonwealth of Kentucky, has not been properly made a defendant to this action.

2. Because the plaintiff, having sued in this action a cor-

29 poration organized under the laws of the State of New York, cannot convert this action into one against a separate and distinct corporation, to-wit: Postal Telegraph Cable Company, a corporation organized under the laws of the Commonwealth of Kentucky.

MORISON R. WAITE,
Attorney for Postal Telegraph Cable Company, a Corporation under the Laws of the Commonwealth of Kentucky.

And thereafter on the 2nd day of January, 1909, the following order was made, which is in words and figures as follows, to-wit:

Order.

30 Comes the Postal Telegraph Cable Company, a corporation under the laws of the Commonwealth of Kentucky, and entering its appearance specially for the purpose of this motion only, and for no other purpose, and not entering its appearance generally to the action herein, moves the court to quash, set aside and hold for naught the service of summons and the return thereof on it in this action, and motion is continued to Saturday, January 9th, 1909.

And thereafter, on the 9th day of January, 1909, the following order was made, which is in words and figures as follows, to-wit:

Order.

Comes the Postal Telegraph Cable Company, a corporation under the laws of the Commonwealth of Kentucky, and entering its
31 appearance specially for the purpose of this motion only, and for no other purpose, and not entering its appearance generally to the action herein move- the court to quash, set aside and hold for naught the service of summons and return thereof on it in this action and plaintiff objects and cause is submitted on motion and objection thereto.

And thereafter on the 26th day of January, 1909, the following order was made, which is in words and figures as follows, to-wit:

Order.

The motion of the defendant, the Postal Telegraph Cable Company of New York, to quash service of summons herein said motion being filed as of June 15th, 1908, is sustained and the plaintiff excepts.

32 And thereafter, on the 6th day of March, 1909, the following Written Order was made and entered, which is in words and figures as follows, to-wit:

Written Order.

The defendant's motion to quash service of summons and return thereof on original petition herein is sustained, and same is hereby quashed and plaintiff excepts.

The defendant's motion to quash service of summons and return thereof on petition as amended herein is over-ruled and defendant excepts.

Order book 45 Page- 433-434.

And thereafter on the 13th day of March, 1909, the following order was made which is in words and figures as follows, to-wit:

Order.

33 Comes Postal Telegraph Cable Company a corporation organized under the laws of Kentucky, and entering its appearance for no other purpose, moves to strike from the files the amended petition of plaintiff in which plaintiff seeks to make it a party and motion is overruled and defendant Kentucky organization excepts.

And thereafter on the same day and date the following order was made, which is in words and figures as follws, to-wit:

Order.

Comes the Postal Telegraph Cable Company, a corporation organized under the laws of Kentucky and entering its appearance for no other purpose *and* demurs specially to the amended petition and said demurrer is overruled and defendant Kentucky corporation excepts.

34 And thereafter on the 27th day of March, 1909, the following order was made, which is in words and figures as follows, to-wit:

Order.

Comes defendant, Kentucky corporation, and moves for leave to file answer and has leave so to do, and said answer is filed.

And thereafter on the same day and date, the Answer referred to in the foregoing order was filed, which is in words and figures as follows, to-wit:

Answer of the Defendant, Postal Telegraph Cable Company, a Corporation Organized under the Laws of Kentucky.

35 The defendant, Postal Telegraph Cable Company, a corporation organized under the laws of the State of Kentucky, for answer to the petition of the Plaintiff herein, says that it

is a corporation created and organized under the laws of the State of Kentucky for the purpose of the reception and transmission of messages by means of a system of telegraphy connecting said City of Newport with other cities and towns in the State of Kentucky, and by connecting with other lines of other telegraph corporations with other States of the United States; and that the said Postal Telegraph Cable Company of Kentucky, defendant herein, acquired by deed from the Postal Telegraph Cable Company of New York, hereinafter referred to as the New York Company, on December 31, 1900, all of the rights and property of the said New York
36 Company in the State of Kentucky, including its right over the roads, streets and alleys in the said State, and the various cities and municipalities thereof wherein and wher-over the said New York Company then had the line and lines of its telegraph system in said State of Kentucky.

Further answering, the defendant denies that on the 5th day of December, 1895, or at any other time, this defendant, or the said New York Company, secured from the plaintiff by an ordinance duly passed by the General Council of said City on said day and entitled as set forth in said Petition, the right and privilege to erect its poles and string its wires in and over the streets and alleys of the City of Newport or to establish, operate and maintain a telegraph
37 system therein by means of said ordinance.

The defendant is informed and believes and hence admits that, on or about the 5th day of December, 1895, The General Council of the City of Newpart attempted to, and passed a pretended ordinance of the tenor and affect set forth in plaintiff's petition and filed therewith, marked "Exhibit A," which reads as set forth in said petition and exhibit. At the time of the passage of said pretended ordinance the defendant had no existence and was not then incorporated, and the Postal Telegraph Cable Company referred to in the said ordinance was the New York Company. Defendant denies that by said pretended ordinance the right and privilege referred to in Plaintiff's petition was granted to the defendant, or the
38 New York Company, and it denies that in consideration of said alleged right and privilege to occupy and use the streets and alleys of the City of Newport, as set forth in said petition, the defendant, or the New York Company promised, agreed or bound itself or either of them, to pay the plaintiff the sum of One Hundred ($100.00) Dollars per annum.

Defendant admits that shortly after the passage of said pretended ordinance above referred to said New York Company began the erection of its poles and the stringing of its wires in and over the streets and alleys of said City of Newport, and established, operated
39 and maintained its said telegraph system therein, and did so to December 31st, 1900, at which time as above referred to, it, the said New York Company, conveyed its interestts to this defendant as above referred to, and that since said December 31st, this defendant has been maintaining and operating said telegraph system in said City of Newport, but the defendant denies that the erection of said poles and the stringing of said wires and the establishment

and operation of said telegraph system in the City of Newport was done by virtue, and in pursuance of said pretended ordinance, and defendant further denies that said New York Company has been, nor has this defendant, nor is this defendant or said New York
40 Company now enjoying any rights and privileges as a grant to it, or either of them under said pretended ordinance by said plaintiff, but, on the contrary avers that such rights and privileges as it, the said New York Company, did enjoy and as this defendant now enjoys in the City of Newport were not granted by said ordinance nor are they enjoyed under the same.

Defendant further denies that the said New York Company above referred to, or the defendant thereby, or otherwise, accepted or did accept said pretended ordinance on the 5th day of December, 1895, or at any other time thereafter, or that the same became a binding contract between the plaintiff and the said New York Com-
41 pany or between it, this defendant, and the plaintiff from and after said date, or at any other time; or that said New York Company, or this defendant entered into any contract with plaintiff to pay plaintiff One Hundred dollars, or any other sum per annum from said Dec. 5th, 1895 for the right and privileges of erecting its poles and stringers its wires in and over the streets and alleys of the City of Newport, or for any other purpose, or that by erecting it, the said New York Company's poles and stringing its wires in and over the streets of the City of Newport after the passage of said pretended ordinance, it accepted said pretended ordinance or entered into any contract whatever with the plaintiff or was under-
42 stood by the plaintiff to have accepted said pretended ordinance or to have entered into any contract with the plaintiff, but on the contrary said poles were erected and said wires strung in and over the streets and alleys of the City of Newport by said New York Company under a claim of right thereto other than under said pretended ordinance, as plaintiff well knew.

II.

Defendant further answering the second paragraph of plaintiff's petition, denies that by the terms or any other way of said ordinance or pretended ordinance, or contract or pretended contract there became due and payable to the plaintiff herein by this defendant on the — day of December, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907 and 1908, or either of said years the sum of One
43 Hundred ($100.00) Dollars, for each of the aforesaid years, ending with the — day of December in each or any of said years; denies that it is indebted to the plaintiff in any sum whatsoever.

III.

The defendant states that the plaintiff's cause of action as to the years 1899, 1900, 1901, 1902, 1903, and each of them, accrued more than five years before the institution of this action. Wherefore

defendant pleads specially and relies on the statute of limitations as to the amount alleged to be due for said years 1899, 1900, 1901 and 1902 and 1903 and each of them, in such cases made and provided, as a bar to any recovery on account of the years 1899, 1900,
44 1901, 1902 and 1903 set up in the petition filed by plaintiff.

IV.

Further answering said petition of the plaintiff, defendant says that the said pretended ordinance referred to in said petition contained among other things the following provision;

"Sec. 5. Should the said Postal Telegraph Cable Company fail, within thirty days after the approval of this ordinance, to signify to the General Council of the City of Newport their acceptance of the rights and privileges granted by this Ordinance, subject to the limitations herein set out, then all the rights and privileges herein granted shall become null and void and of no effect. Said Company shall accept the same in writing, said acceptance shall be
45 entered upon the journal of both Boards of said General Council, and copied upon the Ordinance book of the City of Newport, immediately following said ordinance when recorded."

That the said New York Company did not within thirty days after the approval of this pretended ordinance, or at any other time, nor has this defendant signified to the General Council of the City of Newport its acceptance thereof as in said pretended ordinance provided, nor did it, said New York Company, accept the same in writing or otherwise, nor has this defendant at any time nor was any acceptance entered upon the journal of either or both Boards of said General Council, nor copied upon the Ordinance Book of the City of Newport immediately following such ordinance as recorded, nor at all, but, on the contrary, defendant avers that the said New
46 York Company declined to accept said pretended ordinance. or to signify to the General Council of the City of Newport its acceptance thereof in writing, or otherwise, nor has this defendant accepted said ordinance in any manner or form.

The defendant further says that the said New York Company did not accept said pretended ordinance in any manner whatever and did not erect its poles and string its wires in and over the streets and alleys of said city under or in pursuance of said pretended ordinance, but on the contrary that before the thirty days after Dec. 5th, 1895, within which it was to accept said pretended ordinance in accordance with its terms as above set forth, the said New York Company erected its poles and strung its wires in and over the streets and alleys of said City, under a claim of right so to do independ-
47 ant of said pretended ordinance and not under said pretended ordinance, *and not under said pretended ordinance* which it had not accepted and declined to accept, and did not intend to accept as plaintiff well knew.

V.

Further answering the petition of the plaintiff, the defendant says that it is a corporation duly incorporated under the laws of the State of Kentucky, that the said heretofore referred to New York Corporation is a corporation duly incorporated under the laws of the State of New York for the purpose of the reception and transmission of messages by means of a system of telegraphy, connecting the City of New York in the State of New York with other cities and towns of said State and in various other states in the United States, and that
48 it was prior to December 31, 1900 engaged in operating and maintaining its said system of telegraphy in the State of Kentucky and between the cities and towns in said State and various other cities and towns in the *in the* other states of the United States; that said New York Company on or about March 17th, 1886, accepted the Act of Congress approved July 24, 1866, entitled, "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," and the Acts Amendatory thereof, and on or about the 6th day of April, 1886, the said New York Company filed its written acceptance of the provisions, restrictions and obligations
49 thereof with the Post Master General of the United States as required by said Act and that it has ever since been subject to and has complied with the terms of said Act; that under and in pursuance thereof the said New York Company obtained the right to construct, maintain and operate its lines of telegraph over and along all military or post roads of the United States, which had been or should be declared such by law, and that by Section 3964 of the Revised Statutes of the United States it is provided that all letter carrier routes established in any city or town for the collection and delivery of mail matter shall be post roads and that in pursuance of said section and the Act of Congress of March 1st, 1884, declaring all
50 public highways and roads while kept up and maintained as such to be post roads, and the laws and authorized rules and regulations of the officers and departments of the United States all the streets and alleys of the city of Newport are and have been continuously, since the 1st day of March 1884, such post roads, and that the said New York Company, by virtue of these provisions of law of the United States was entitled to the right to erect its poles and string its wires over and along the streets and alleys of the City of Newport, subject only to the condition that its lines of telegraph should be so constructed and maintained as not to obstruct or interfere with the Ordinary travel thereon.

51 Defendant says that under and in pursuance of its right as heretofore set forth to erect poles and string wires over the streets and alleys of the City of Newport and to establish its telegraph system therein as conferred by the laws of the United States as aforesaid, the said New York Company heretofore referred to, did erect its poles and string its wires and establish its telegraph system in said City of Newport in such manner as not to obstruct or interfere with the ordinary travel thereon and not

in pursuance of any acceptance written or otherwise, of the pretended ordinance of December 5th, 1895, referred to in, and set out as Exhibit "A" to Plaintiff's Petition, nor under said
52 pretended ordinance, nor under any contract with said city, and that this defendant by reason of the aforesaid conveyance to it by said New York company is now so maintaining said system in the City of Newport.

Defendant says that by Section 6 of said pretended ordinance it was provided that "Nothing in this Ordinance shall be construed as granting a franchise to said Postal Telegraph Cable Company," and that no franchise was conferred upon said New York Company thereby; that said City of Newport had no right to impose as a condition to the erection by the New York Company of its poles and the stringing of its wires over the streets and alleys of said city the payment of a special license tax of $100.00, nor did
53 said City of Newport have the right to impose the payment of said sum as a special license tax for a grant of license from said City to said New York Company of the right to erect its poles and string its wires in and over the streets and alleys of the City of Newport or to maintain its lines of telegraph in said City, nor as a condition to the grant of license to it to conduct its business in said city, including its business between said City and other Cities and Towns in other states of the Union than the State of Kentucky.

Defendant further says that the plaintiff did not by said pretended ordinance attempt to impose any rental upon said New York Company for the use of its streets and alleys occupied
54 by it and by this defendant under its conveyance from said New York Company and that the payment of $100.00 per annum to be made by said New York Company to plaintiff under Section 7 of said pretended ordinance was not imposed as rental by plaintiff nor intended so to be, but as a special license tax as therein provided, nor was the $100.00 per annum a reasonable rental nor otherwise a reasonable, lawful exaction as a license tax or otherwise for the use made of the streets and alleys of said City by the Defendant, nor was payment of the same agreed to by said New York Company or by the defendant as rental or otherwise.

Defendant further says that said New York Company did not accept said pretended ordinance in the manner prescribed therein for its acceptance thereof, or in any other manner and did not
55 erect and maintain, nor does this defendant, its system of telegraph lines therein in pursuance of any grant or right or privilege conferred upon it by said pretended ordinance, but that it did erect and that this defendant does now maintain its said system of telegraphy in said city of Newport under the rights conferred by virtue of the acceptance by the said New York Company of the Act of Congress of July 24, 1866, aforesaid.

Defendant says that the said New York Company and this defendant have paid to the State of Kentucky to the City of Newport and to other public authorities in said State of Kentucky all the taxes legally due from it, or either of them for the years

1899 to 1908, inclusive, to said State and to all the public authorities thereof and of all its sub-divisions upon all the property of the said New York Company during the time it owned the same in Kentucky, and this defendant since its incorporation and transfer to it of the property and rights of said New York Company, to-wit: December 31, 1900, both tangible and intangible within said State, including franchise taxes.

Defendant further says (that one or more other telegraph companies have erected and maintained, and were during the years 1899 to 1908, inclusive, and are now maintaining in the City of Newport a system of telegraph poles and lines, and also one or more telephone companies have used the streets and alleys of the said city for its poles and wires in a manner substantially similar to the system of telegraph poles and lines owned, operated and maintained by the said New York Company and by the defendant in said City, and that none of these companies other than the defendant is subject to the payment of any license tax, similar to that attempted to be exacted from the defendant, by and under the provisions of the pretended ordinance set out in the petition and for the payment of which this action is brought, and said other telegraph and telephone companies were admitted into the City of Newport and were permitted to erect their poles and lines in the streets and alleys of the City of Newport without being compelled or required and without agreeing, either before, or at the time of said admissions, or since, to pay or make any compensation whatsoever to said City by way of rental, license or otherwise.)

The defendant further says that the said New York Company did not accept the provisions of the said pretended ordinance or enter into any contract with the City of Newport in pursuance thereof, or otherwise, to pay the sum of $100.00 per annum as a special license tax for the privilege of erecting and maintaining its lines of telegraph in said City of Newport, or for conducting its business of transmitting messages from said City of Newport to other cities and towns in other states of the Union than the State of Kentucky or as a rental or for any other purpose and that there was and is no consideration for such alleged contract purporting to arise under said pretended ordinance because of the alleged grant of any right or privilege to the said New York Company or this defendant, requiring the defendant to pay to the City of Newport the sum of $100.00 for said years 1899 to 1908, inclusive, respectively, or at any other time, and that the said alleged contract is beyond the powers, of said City of Newport to make and is Ultra vires, null and void, and that the attempted exaction of the payment from the defendant of a special license tax of $100.00 per year for each of the years ending December — 1899 to 1908, inclusive, respectively, by virtue of said alleged contract; or under said pretended ordinance, is an unreasonable discrimination between the defendant and other telegraph companies operating and maintaining their lines of telegraph in the City of Newport and the telephone com-

panies aforesaid, contrary to the laws of the State of Kentucky conferring upon the City of Newport the power to license telegraph and any other companies, trades, occupations and employments and in violation of the Constitution of the State of Kentucky, and of the First Section of the fourteenth amendment to the Constitution of the United States, securing to every person within
61 the jurisdiction of the State of Kentucky the equal protection of the laws, and is also an unreasonable, excessive and unlawful exaction in violation of those provisions of Section 8 of Article 1 of the Constitution of the United States, authorizing and conferring upon the Congress of the United States the power to regulate commerce among the several States and to establish post offices and post roads, and the laws enacted in pursuance thereof and is otherwise in violation of said Constitution and laws of the United States and is, therefore null and void.

VI.

Defendant further says that when said plaintiff attempted to pass the ordinance on the — day of December, 1895, as set forth
62 in plaintiff's petition, marked Exhibit "A" and made part thereof, whereby it attempted to confer upon the New York Company the right and privilege to use the streets and alleys of the City of Newport for the purpose of erecting poles and stringing wires thereon and maintaining a system of telegraphy in the City of Newport, said plaintiff wholly failed to make due advertisement that it would grant said franchise or privilege, wholly failed to receive bids therefor publicly, wholly failed to award the same to the highest and best bidder and that by reason of said failure, said pretended ordinance is wholly void and inoperative because said right and privilege was not conferred in accordance with Section 164 of the Constitution of the Commonwealth of Kentucky then in force and Section
63 3068 of the Kentucky Statutes, which is a part of the charter of the cities of the second class *of* the City of Newport, Kentucky.

Wherefore, defendant prays that plaintiff's petition be dismissed and that it go hence with its costs.

MORISON R. WAITE,
THOS. P. CAROTHERS,
Attorneys for Defendant.

And thereafter on the 31st day of March, 1909, the following Demurrer to Defendant's Answer and to each Paragraph thereof was filed, which is in words and figures as follows, to-wit:

General Demurrer of Plaintiff, City of Newport, to Defendant's Answer and to Each Paragraph Thereof.

64 The plaintiff, City of Newport, states that neither the defendant's answer nor any paragraph thereof, state facts sufficient to constitute a defense.

C. T. BAKER,
Attorney for City of Newport.

And thereafter on the 3rd day of April, 1909, the following order was made which is in words and figures as follows, to-wit:—

Order.

Comes plaintiff and demurs to answer and each paragraph thereof and moves for leave to file Exhibit "A," and has leave so to do and said Exhibit "A" is filed and cause is submitted on demurrer.

65 And thereafter on the 3rd day of April, 1909, the Exhibit "A" referred to in the foregoing order, was filed, which is in words and figures as follows, to-wit:—

EXHIBIT "A."

An Ordinance granting to the Postal Telegraph Cable Company the right and privilege of erecting poles and stretching wires through the streets and alleys of the City of Newport, Ky. (Approved December 18, 1895).

Be it ordained by the General Council of the City of Newport, Ky.

1. That the right and privilege of erecting poles and stretching wires in and over the streets and alleys of the City of Newport, Ky., necessary to the establishment, operation and maintenance of a telegraph system connecting said city with other towns and cities, is hereby granted to the Postal Telegraph Cable Company and
66 its successors, subject to the limitations and restrictions hereinafter set out and provided.

2. The said Postal Telegraph Cable Company shall furnish the Mayor and Superintendent of Public Works with a statement, in writing, of the streets, alleys and parts thereof through which they desire to erect their poles and over which they propose to stretch their wires in establishing their system in the City of Newport; but said streets and alleys shall not be used for said purpose until the said Mayor and Superintendent of Public Works consent thereto, and if they so consent, the location of the poles, the height of the same, and all reasonable regulations of the same, shall be subject to
67 the approval of the Superintendent of Public Works; and when the said system has been located and put in operation, no additional street or alley shall be occupied without permission of the General Council, Mayor, and Superintendent of Public Works in like manner as the privilege herein granted has been given; and said Company shall erect no additional poles, or change the location of any poles when erected, without the consent and under the supervision of the Superintendent of Public Works.

3. Should the said Postal Telegraph Cable Company, or any successor of said Company, lease, rent or consolidate so much of said system as is located in the City of Newport with any other
68 corporation, person or association of persons engaged in the same or like business, or shall enter into any combination, trust or arrangement with any other corporation, person or associa-

tion of persons engaged in like business, with reference to said business, or the rates to be charged for services performed by said Company, then all the rights and privileges granted to or conferred upon the Postal Telegraph Cable Company, or anyone holding under said Company, shall cease and become absolutely null and void, and all poles, wires or other property located in the streets or alleys in pursuance of this or any other ordinance, shall at once be removed by the owner or lessee of the same.

69 4. Said Company shall keep and maintain an office in the City of Newport for the receiving and transmitting of messages, and it shall charge for sending said messages no greater than that charged by the Western Union Telegraph Company for similar services under like conditions.

5. Should the said Postal Telegraph Cable Company fail, within thirty (30) days after the approval of this ordinance, to signify to the General Council of the City of Newport their acceptance of the rights and privileges granted by this ordinance, subject to the limitations herein set out, then all of the rights and privileges herein granted shall become null and void and of no effect.

70 Said Company shall accept the same in writing. Said acceptance shall be entered upon the journal of both Boards of said General Council and copied upon the ordinance book of the City of Newport, immediately following said ordinance when recorded.

6. Nothing in this ordinance shall be construed as a forfeiture or waiver by the City of Newport of any of its rights or privileges to require telegraph or telephone wires to be placed under ground, or to make any proper or necessary regulations of poles and wires in the streets and alleys of the City, nor shall anything in this ordinance be construed as granting a franchise to the said Postal Telegraph Cable Company.

71 7. The said Postal Telegraph Cable Company shall pay to the City of Newport a special license tax of One Hundred ($100.00) Dollars per annum.

8. This ordinance shall take effect and be in force from and after its passage and approval and publication as required by law.

And thereafter on the 15th day of July, 1909, the following Written Order was made and entered, which is in words and figures as follows, to-wit:

Order.

Plaintiff's demurrer to each paragraph of defendant's Answer is overruled as to paragraph three and six and plaintiff excepts, and said demurrer is sustained as to paragraphs one, two, four

72 and five and defendant excepts.

And thereafter on the 2nd day of October, 1909, the following order was made, which is in words and figures as follows, to-wit:

Order.

Comes plaintiff and moves to set aside that part of order of July 15th, 1909, overruling plaintiff's demurrer to paragraph- three and six of Defendant's Answer and motion is passed.

And thereafter on the 1st day of October, 1910, the following order was made, which is in words and figures as follows, to-wit:

Order.

Came plaintiff and filed Amended Petition and defendant objects and the objection is overruled and defendant excepts.

73 And thereafter on the same day and date, the Amended Petition referred to in the foregoing order was filed, which is in words and figures as follows, to-wit:

Second Amended Petition.

Par. 1. The plaintiff, for amendment to the petition says, that on September 9th, 1899, the City of Newport filed a Petition in the Campbell Circuit Court at Newport, which is in words and figures as follows, to-wit:

Campbell Circuit Court.

12860.

CITY OF NEWPORT, Plaintiff,
vs.
THE POSTAL TELEGRAPH CABLE CO., Defendant.

Petition.

74 The plaintiff, the City of Newport says that the defendant, the Postal Telegraph Cable Company is a foreign corporation, created and organized under the laws of the State of New York, for the purpose of the reception and transmission of messages by means of a system of telegraphy connecting said city with other Cities and Towns in this State and various other States of the United States; that it is empowered to contract and be contracted with, sue and be sued by its corporate name, "The Postal Telegraph Cable Company"; that on the 5th day of December, 1895, the said defendant secured from said plaintiff, by an Ordinance duly passed by the General Council of said City on said day, and entitled, "An
75 Ordinance granting to the Postal Telegraph Cable Company the right and privilege of erecting poles and stretching wires through the streets and alleys of the City of Newport, Kentucky," the right and privilege to erect its poles and string its wires in and

over the streets and alleys of the City of Newport, and establish, operate and maintain a telegraph system therein; a duly certified copy of said Ordinance is filed herewith and made a part hereof, marked Exhibit "A"; that the first section of said ordinance granting said right and privilege reads as follows, to-wit: "That the right and privilege of erecting poles and stretching wires in and over the
76 streets and alleys of the City of Newport, Kentucky, necessary to the establishment, operation and maintenance of a telegraph system connecting said system with other Towns and Cities, is hereby granted to the Postal Telegraph Cable Company and its successors, subject to the limitations and restrictions hereinafter set out and provided." Plaintiff further says that in consideration of said right and privilege to so occupy and use the streets and alleys of plaintiff as aforesaid, the said defendant promised, agreed and bound itself to pay to the said plaintiff, the sum of One Hundred ($100.00) Dollars per annum by Section seven (7) of said ordinance, which reads as follows, to-wit: "The said Postal Tele-
graph Cable Company shall pay to the City of Newport, a
77 special license tax of One Hundred ($100.00) Dollars per annum." Plaintiff further says that immediately after the passage of said Ordinance, and by virtue of and in pursuance thereto, said defendant began the erection of its poles and the stringing of its wires in and over the streets and alleys of the said City of Newport, and established, operated and maintained its said telegraph system therein, which system ever since said day, has been and is now so established, operated and maintained and for the purpose aforesaid; that the said defendant ever since the passage of said ordinance, has been and is now enjoying all the rights and privileges as granted
to it under same, by said plaintiff; and that said defendant
78 thereby accepted, and did accept, said ordinance on the 5th day of December, 1895, and it thereby became a binding contract between said plaintiff and defendant from and after said day. Plaintiff further states that by the terms of said ordinance and contract there became due and payable to the plaintiff herein by said defendant on the 5th day of December, 1897, the sum of One Hundred ($100.00) Dollars for the year ending with said last named date, but that the said defendant in total disregard of its said contract, and in violation of same failed and refused to pay the whole or any part thereof to plaintiff, although often requested to do so, and still
so fails and refuses.

79 2. For a second cause of action plaintiff further says that by the terms of said ordinance and contract there became due and payable to the plaintiff herein by said defendant on the 5th day of December, 1898, the additional sum of One Hundred ($100.00) Dollars, for the year ending with said last named date, but that the defendant in total disregard of its said contract and in violation of same failed and refused to pay the whole or any part thereof to plaintiff, although often requested so to do, and still so fails and refuses.

Wherefore, plaintiff prays judgement against the defendant, the Postal Telegraph Cable Company, for the sum of One Hundred Dol-

lars with interest from the 5th day of December, 1897, until
80 paid, and for the additional sum of One Hundred Dollars, with interest from the 5th day of December, 1898, until paid, and all other relief.

HORACE W. ROOT,
City Attorney

Plaintiff further says that in the suit No. 12860 the defendant was served with process and fully answered therein, and the said cause being submitted, this Court did on May 10th, 1902, duly and regularly render a judgement in said cause which is in words and figures as follows, to-wit:

"Campbell Circuit Court.

12860.

CITY OF NEWPORT
vs.
POSTAL TELEGRAPH CABLE COMPANY.

J'dg't.

81 It is adjudged that the City of Newport recover of the defendant, the Postal Telegraph Cable Company, the sum of $100.00, with interest from December 15th, 1897, and $100.00 with interest from December 5, 1898, until paid, and its costs herein expended, for which execution may issue." Said judgment being spread upon the Order Book of said Court.

Plaintiff further says that said cause was appealed to the Court of Appeals by the Defendant, and that on October 14th, 1903, the Court of Appeals of Kentucky affirmed said judgement. Said cause is reported in 25 Kentucky Law Reporter, page 636.

Plaintiff says that the Postal Telegraph Cable Company,
82 defendant in this action, and organized under the laws of the Commonwealth of Kentucky, is the same Postal Telegraph Cable Company that was organized under the laws of the State of New York, and was defendant in case No. 12860, or that the Postal Telegraph Cable Company, defendant in this action is the lessee or successor of, and succeeded to all the rights, privileges and duties of the Postal Telegraph Cable Company, defendant in case No. 12860; that one of said alternative statements is true, but the plaintiff does not know which of them is true.

Plaintiff says that the Postal Telegraph Cable Company that is now operating in the City of Newport, Kentucky, is using, operating and controlling the same poles, wires and equipment and
83 claiming ownership thereof as was used, operated and controlled by the Postal Telegraph Cable Company, defendant in case No. 12860.

Plaintiff says that the judgement rendered in case No. 12860 and affirmed by the Court of Appeals has never been modified, annulled,

set aside, reversed or appealed from and is now in full force and effect.

Plaintiff says that the Postal Telegraph Cable Company is organized under the laws of the State of Delaware, State of New Jersey, State of New York, State of West Virginia, The Commonwealth of Kentucky, and various other States of the United States which are unknown to plaintiff.

Plaintiff pleads said proceedings and judgement as set out
84 in this pleading as a bar to the defense set up in this action.

Wherefore, plaintiff prays as heretofore and for all other proper relief.

C. T. BAKER,
City Solicitor.

The affiant, Edward L. Krieger, says that he is mayor of the City of Newport, and that the allegations of the foregoing are true as he believes.

——— ———.

Subscribed and sworn to before me by Edward L. Krieger this — day of ———, 1910.

And thereafter on the 15th day of October, 1910, the fol-
85 lowing order was made, which is in words and figures as follows, to-wit:

Order.

Came defendant and moved to strike from files Amended Petition filed October 1st, 1910. Motion overruled and defendant excepts.

And thereafter on the 29th day of October, 1910, the following order was made which is in words and figures as follows, to-wit:

Order.

Came defendant and demurs to the Amended Petition and same is passed.

And thereafter on the 19th day of November, 1910, the following order was made, which is in words and figures as follows, to-wit:

Order.

86 This cause is submitted and set for hearing Monday at 4 o'clock P. M.

And thereafter on the 9th day of January 1911, the following Written Order was made, which is in words and figures as follows, to-wit:

Written Order.

This cause is submitted on defendant's demurrer to Plaintiff's second Amended Petition. The Court will regard said pleading as a reply and plea in bar to paragraph six of Defendant's Answer, and as such the demurrer thereto is overruled and defendant excepts.

And thereafter on the 4th day of February, 1911, the following order was made, which is in words and figures as follows, to-wit:

Order.

87 Comes plaintiff and moves to submit for judgement and same is withdrawn.

And thereafter on the 11th day of March, 1911, the following order was made which is in words and figures as follows, to-wit:

Order.

Came defendant and asks leave to file Amendment to first and fifth paragraphs of Answer and same is granted, and ordered filed and is filed. Came defendant, Postal Telegraph Cable Company and offers to file rejoinder and plaintiff objects and same is entered and offered.

And thereafter on the same day and date the amendment to the first and fifth paragraphs of Answer referred to in the foregoing order, was filed, which is in words and figures as follows, to-wit:

88 *Amendment to First and Fifth Paragraphs of Answer.*

Amendment to the First and Fifth Paragraphs of the Answer of the Defendant Postal Telegraph Cable Company, a Corporation Organized under the Laws of the State of Kentucky, Filed on the — Day of —— 19—.

The defendant, the Postal Telegraph Cable Company, a corporation organized and existing under the laws of the State of Kentucky by leave of Court first had, for an amendment to the first paragraph of its answer filed herein on the — day of ——, 19—, says, that the Postal Telegraph Cable Company of New York, referred to in the petition herein on or about the first day of January, 1897, transferred sold and conveyed its property rights and lines of telegraph
89 in the State of Kentucky and elsewhere, including its right over the roads, streets and alleys in said State and the various cities and municipalities thereof wherein and whereover the said New York Company then had a line and lines of its telegraph system in said State, to the Commercial Cable Company, a corporation under the laws of the State of New York, which latter company on the same day mortgaged said property, lines, franchises, etc., to the Farmers Loan and Trust Company as Trustee, to secure an issue of twenty

million four per cent gold bonds and debenture stock. Thereafter, on or about the 30th day of June, 1898, the said Commercial Cable Company sold, transferred and conveyed to the Commercial
90 Cable and Telegraph Company a corporation under the laws of New York, subject to said mortgage, all of the rights, franchises and property in the State of Kentucky which it had acquired from said Postal Telegraph Cable Company of New York; said property so transferred included the rights which said New York Company had originally had in the roads, streets and alleys in said State of Kentucky, and in the various cities and municipalities thereof, wherein and whereover the said Company theretofore had a line or lines of its telegraph system in said State. Thereafter on or about the 31st day of December, 1900, all of said rights and property of said Commercial Cable and Telegraph Company in the State of Kentucky were transferred and conveyed for a valuable
91 consideration to this defendant, the Postal Telegraph Cable Company, a corporation under the laws of Kentucky. From the 2nd day of January, 1897 to the 30th day of June, 1898, said The Commercial Cable Company hereinbefore referred to owned and operated the lines hereinbefore described in the name of the Postal Telegraph Cable Company of New York, and from said 30th day of June, 1898, to the 31st day of December, 1900, said Commercial *Club* and Telegraph Company owned and operated said lines in the name of said New York Company, and since said 31st day of December, 1900 all of said lines have been owned and operated by this defendant.

For amendment to paragraph five of said answer, this defendant says that said Postal Telegraph Cable Company of New York,
92 prior to January 2, 1897, and not prior to December 31, 1900 as alleged in said paragraph, was engaged in operating and maintaining its said system of telegraphy in the State of Kentucky, and between the cities and towns in said State and various other cities and towns in other states of the United States, and that after said 2nd day of January, 1897, it withdrew from active business, except certain business in the State of New York.

Wherefore defendant prays as in his original answer.

THOS. P. CAROTHERS &
WAITE & SCHINDEL,
Attorneys for Defendant.

93 STATE OF KENTUCKY,
County of Campbell, ss:

—— ——, Being first duly sworn says that he is the agent in the City of Newport of the Postal Telegraph Cable Company, a corporation under the laws of Kentucky, and that he believes that the facts stated in the foregoing amendments are true.

—— ——.

Sworn to before me and subscribed in my presence this — day of February, 1911.

—— ——,
Notary Public, Campbell County, Kentucky.

And thereafter on the same day and date, the rejoinder referred to in the foregoing order, entered and offered, is in words and
94 figures as follows, to-wit:—

Rejoinder Entered and Offered.

Answer or Rejoinder of The Postal Telegraph Cable Company, a Corporation under the Laws of the State of Kentucky, to the Second Amended Petition or Reply.

The Postal Telegraph Cable Company, a corporation organized and existing under the laws of the State of Kentucky, denies that it is the same Postal Telegraph Cable Company that was organized under the laws of the State of New York and was defendant in cause No. 12860, or that the Postal Telegraph Cable Company, defendant in this action is the lessee or successor of said Company or has succeeded to all the rights of the Postal Telegraph Cable Com-
95 pany, defendant in said cause or to any of the rights of said Company under said pretended ordinance of December 5th, 1895, and denies that it has succeeded to any of the duties of said company.

This defendant further says that on or about the first day of January, 1897, the said Postal Telegraph Cable Company, of New York, sold, transferred and conveyed for a valuable consideration to the Commercial Cable Company, a corporation under the laws of the State of New York, all of the rights and property of the said New York Company in the State of Kentucky and elsewhere, including its right over the roads, streets and alleys in said State and in the various cities and municipalities thereof, wherein and whereover the said New York Company then had the line or lines of its telegraph system in the State of Kentucky. Said, The Commercial
96 Cable Company thereafter, on said first day of January, 1897, mortgaged said property, rights and franchises to the Farmers Loan and Trust Company, as Trustee, to secure an issue of twenty million dollars gold bonds and debenture stock. Thereafter beginning on or about the 2nd day of January 1897 and continuing until on or about the 30th day of June, 1898 said, the Commercial Cable Company operated said telegraph lines in the State of Kentucky and elsewhere, except certain lines in the State of New York, in the name of the Postal Telegraph Cable Company of New York.

Thereafter, on or about the 30th day of June, 1898, said, the Commercial Cable Company, sold and transferred for a valuable consideration, to The Commercial Cable and Telegraph Com-
97 pany, a corporation duly organized and existing under the laws of the State of New York, subject to said mortgage, all of said lines of telegraph in said State of Kentucky, including its rights over the roads, streets and alleys in said State and in the municipalities thereof, all of which said Company continued to own until on or about the 31st day of December, 1900, and operated said lines in the name of Postal Telegraph Cable Company of New York.

On or about said 31st day of December, 1900, said Commercial Cable & Telegraph Company for a valuable consideration sold, transferred and conveyed all of said rights, including its rights over the roads, streets and alleys in said State and the various cities and
98 municipalities thereof, wherein and whereover it then had the line and lines of its said Telegraph system in said State of Kentucky, to this defendant, a corporation duly organized and existing under the laws of the State of Kentucky. Ever since said date this defendant has owned and operated and still owns and operates said lines. It is entirely separate and distinct from said Postal Telegraph Cable Company of New York, and since said 31st day of December, 1900, has had no contract, relations or business transactions whatsoever with said New York Company. Said Postal Telegraph Cable Company of New York retired entirely from active business, except certain business in the State of New York, and said corporation, in fact, no longer bears the same name as the
99 Kentucky Company, but by order of the Supreme Court of the State of New York the name of said Company was changed from the Postal Telegraph Cable Company to the Transcontinental Telegraph Company, and the latter is now the name of said Company.

Paragraph 2.

For further answer or rejoinder to said second amended petition or reply, the defendant says that it is a corporation duly incorporated under the laws of the State of Kentucky, and that since the 31st day of December, 1900, it has been engaged in operating and maintaining a system of telegraphy in the State of Kentucky between the cities and towns of said State and in connection with other com-
100 panies between various other Cities and Towns in other States of the United States; that on or about the 3rd day of December, 1900, this defendant accepted the Act of Congress approved July 24th, 1866, entitled, "An Act to aid in the construction of Telegraph lines and to Secure to the Government the use of the same for Postal, Military and other Purposes," and the Acts amandatory thereof, and filed its written acceptance of the provisions, restrictions and obligations thereof with the Post Master General of the United States, as required by said Act, and that it has ever since been subject to and has complied with the terms of said Act; that under and in pursuance thereof ot has obtained the right to construct, maintain
101 and operate its lines of telegraph over and along all military or post roads of the United States which had been or should be declared such by law; that by section 3964 Revised Statutes of the United States, it is provided that all letter carrier routes established in any city or town for the collection and delivery of mail matter shall be post roads, and that in pursuance of said section and the act of Congress of March 1, 1884, declaring all public highways and roads while kept up and maintained as such to be post roads and the laws and authorized rules and regulations of the officers and Departments of the United States, all of the streets and alleys of the City

of Newport are and have been continuously since the first day of March 1884, such post roads, and by virtue of these provisions of the law of the United States, it is entitled to the right to erect its poles and string its wires over and along the streets and alleys of the City of Newport, subject only to the condition that its lines of telegraph should be so constructed and maintained as not to obstruct or interfere with the ordinary travel thereon.

Defendant further says that pursuant to its rights heretofore set forth to erect poles and string wires over the streets and alleys of the City of Newport, and to establish a telegraph system therein as conferred by the law of the United States as aforesaid, and by reason of the conveyance set forth in the first paragraph hereof, it is operating and maintaining its telegraph system in said City of Newport in such manner as not to obstruct or interfere with the ordinary travel of said city streets and is not operating or maintaining said system in pursuance of any acceptance written or otherwise, by said New York Postal Company of the pretended ordinance of December 5th, 1895, as set out as Exhibit "A" of Plaintiff's original petition, nor by virtue of any contract with said city, nor as the successor or lessee of said New York Company.

Wherefore defendant prays that plaintiff's petition may be dismissed and that it will go hence with its costs.

THOS. P. CAROTHERS &
WAITE & SCHINDEL,
Attorneys for Defendant.

STATE OF KENTUCKY,
County of Campbell, ss:

—— ——, being first duly sworn, says that he is the agent in the City of Newport of the Postal Telegraph Cable Company, a corporation under the laws of the State of Kentucky, and that he believes that the facts stated in the foregoing pleadings are true.

—— ——.

Sworn to before me and subscribed in my presence this — day of February, 1911.

—— ——,
Notary Public, Campbell County, Ky.

And thereafter, on the 4th day of October, 1913, the following order was made, which is in words and figures as follows, to-wit:—

Order.

Comes plaintiff and moves to set aside order overruling demurrer to paragraphs three and six of answer and to submit on whole case and is passed one week.

And thereafter on the 11th day of October, 1913, the following order was made, which is in words and figures as follows, to-wit:—

Order.

Comes plaintiff and moves to set aside order overruling de-
106 murrer to third and sixth paragraphs of answer, and to sub-
mit on whole case, and is submitted on motion with leave to
brief.

And thereafter on the 9th day of December, 1913, the Judgement rendered is in words and figures as follows, to-wit:

Judgement.

This cause is submitted for judgement on the pleadings and the answer or rejoinder offered by defendant March 11th, 1911 is now ordered filed, and the Court being advised, it is adjudged that the plaintiff recover of the defendant the following sums:

$100.00	with	interest	from	Dec.	31st,	1903.
100.00	"	"	"	"	"	1904.
100.00	"	"	"	"	"	1905.
100.00	"	"	"	"	"	1906, and
100.00	"	"	"	"	"	1907.

107 and its costs herein incurred for which execution may issue.
The petition as to the other sums prayed for is dismissed. To all of which both of the parties hereto except and prays an appeal to the Court of Appeals which is granted.

55/175.

And thereafter on the 7th day of January, 1914, the Schedule was filed, which is in words and figures as follows; towit:

Schedule.

The Clerk is ordered to make a complete transcript of the Record of City of Newport against the Postal Telegraph Cable Company.

WAITE & SCHINDEL,
Attorneys for the Postal Telegraph Cable Company.

108 And thereafter on the same day and date, the Supersedeas
Bond with the American Surety Company of New York as
Surety, was filed, which is in words and figures as follows, to-wit:

Campbell Circuit Court.

STATE OF KENTUCKY,
County of Campbell:

THE POSTAL TELEGRAPH CABLE CO., Appellant,
vs.
CITY OF NEWPORT, Appellee.

Upon an Appeal from a Judgement of the Campbell Circuit Court, Rendered December 9th, 1913.

Whereas, said appellant, the Postal Telegraph Cable Company has prayed an appeal from a judgement of the Campbell
109 Circuit rendered December 9th, 1913, at Newport against appellant, the Postal Telegraph Cable Company in favor of the Appellee, City of Newport for $100.00, with interest from December 31st, 1903; $100.00 with interest from Dec. 31st, 1904; $100.00 with interest from Dec. 31st, 1905; $100.00 with interest from Dec. 31st, 1906; $100.00 with interest from Dec. 31st, 1907. And the appellant desires to supersede the said judgement.

Now, we, the Postal Telegraph Cable Company, principal, and the American Surety Company of New York, Sureties hereby covenany to and with the appellee, City of Newport, that the appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that
110 the Postal Telegraph Cable Company will satisfy and perform the said judgement, in case it shall be affirmed, and any Judgement or Order which the Court of Appeals may render or order to be rendered by the Inferior Court, not exceeding in amount or value of the Judgement aforesaid, and also pay all rents, hire or damage which during the pendency of the appeal, may accrue on any of the property of which the appellee is kept out of possession by reason of the appeal.

Witness our hands this 7th day of January, 1914.

THE POSTAL TELEGRAPH CABLE COMPANY,
By WAITE & SCHINDEL, *Its Attorneys.*

Attest:
W. H. NEWELL, *Clerk,*
By ——— ———, *Deputy Clerk.*

111 AMERICAN SURETY CO. OF NEW YORK,
[SEAL.] By JOHN WM. HEUVER,
Resident Ass't Secretary,
By M. M. WARE, *Resident Vice-President.*

55/243.

And thereafter on the same day and date the Supersedeas and copy was issued, which is in words and figures as follows, to-wit:

STATE OF KENTUCKY,
Clerk's Office of the Campbell Circuit Court:

I do certify that an Appeal has been granted by this Court from a Judgement obtained by the City of Newport against The Postal Telegraph Cable Company, for $100.00 with interest from
112 Dec. 31st, 1903; $100.00 with interest from Dec. 31st, 1904; $100.00 with interest from Dec. 31st, 1905; $100.00 with interest from Dec. 31st, 1906; $100.00 with interest from Dec. 31st, 1907, in the Campbell Circuit Court December 9th, 1913, at Newport, and that a Supersedeas Bond has been executed. Therefore, the Appellee, and all others are commanded to stay proceedings on the said judgement above recited.

Witness my hand as Clerk of said Court, this 7th day of January, 1914.

Attest:

W. H. NEWELL, *Clerk.*
——— ———, *D. C.*

And thereafter on the 16th day of January, 1914, the Sheriff's return on S-persedeas was filed, which is in words and figures as follows, to-wit:

113 *Sheriff's Return on Supersedeas.*

Executed this 10th day of January, 1914, the within Supersedeas on the City of Newport, Ky., by delivering to August Helmbold a true copy hereof he being Mayor of said City and Highest Officer found in my County.

BOONE GOSNEY, *Sheriff,*
By AD. IMFELD, *D. S.*

Fees 50¢.

COMMONWEALTH OF KENTUCKY:

Campbell County Circuit Court.

STATE OF KENTUCKY,
County of Campbell, ss:

I, W. H. Newell, Clerk *for* the Circuit Court for the County aforesaid, do hereby certify that the foregoing 60 pages of typewritten matter and this page contain a full, true and complete tran-
114 script, as per schedule, of the record and proceedings of the within styled action, which is of record and remains on file in my office.

Witness my hand as Clerk of said Court, this 16th day of March, 1914.

W. H. NEWELL,
Clerk Campbell Circuit Court.

Transcript fee $16.25.
Received payment in full,

W. H. NEWELL,
Clerk Campbell Circuit Court.

115 Be it remembered that on the 13th day of October, 1914, at a Court of Appeals held in and for the Commonwealth of Kentucky, at the Capitol *and* the City of Frankfort, the following Judgment was entered:

Judgment.

POSTAL TELEGRAPH CABLE CO., Appellant,
vs.
CITY OF NEWPORT, Appellee.

Appeal from Campbell Circuit Court.

The Court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that the judgment be affirmed on both the original and cross appeal, and that appellee recover of appellant ten per cent damages on the amount of the judgment superseded herein on the original appeal, which is ordered to be certified in said court.

It is further considered that appellee recover of appellant its cost herein expended on the original appeal and that appellant recover of appellee its cost herein expended on the cross appeal.

Be it further remembered that on said judgment the following opinion was rendered, viz:

116 Court of Appeals of Kentucky, October 13, 1914.

POSTAL TELEGRAPH CABLE COMPANY, Appellant,
vs.
CITY OF NEWPORT, Appellee.

Appeal from Campbell Circuit Court.

Opinion of the Court by Judge Carroll, Affirming.

In 1895 the council of the city of Newport adopted an ordinance granting to the Postal Telegraph Cable Company, and its successors, the right and privilege of erecting poles and stretching wires through the streets and alleys of the city of Newport.

The ordinance contains several sections defining the rights of the city and the company that it is not necessary to here notice, and further provided "Nor shall anything in this ordinance be construed as granting a franchise to the said Postal Telegraph Cable Company."

117 In section seven it was provided that "The said Postal Telegraph Cable Company shall pay to the city of Newport a special license tax of one-hundred dollars per annum."

In 1899 the city brought suit against the Cable Company to recover the one hundred dollars license tax for the years 1897 and 1898, and from a judgment awarding it this sum, the Cable Company prosecuted an appeal to this court, where the judgment of the lower court was affirmed in an opinion that may be found in 25 Ky. L. R., 635.

In 1897 the Cable Company, which it appears was a New York corporation, sold and conveyed its property in the State of Kentucky, including all rights and interests it had in the city of Newport, to the Commercial Cable Company, another New York corporation. In 1898 the Commercial Cable Company sold and conveyed all of its property, rights and privileges to the Commercial Cable & Telegraph Company, also a New York corporation. In December, 1900, this company sold its property, rights and privileges to the appellant, which is a Kentucky corporation; and since then it has owned, operated and controlled the poles, wires and other property of its predecessors in the city of Newport and occupied the streets and public ways of the city under the ordinance referred to.

In 1908 this suit was brought seeking to recover from the original grantee under the ordinance, the Postal Telegraph Cable

118 Company of New York, the special annual license tax of one hundred dollars for the years 1899 to 1907, inclusive, but by an amended petition the present appellant was made a defendant and the case against the New York corporation dismissed.

In this suit the appellant set up a number of defenses, and after the case had been submitted on the pleadings and exhibits, there was a judgment against it for the license tax due for the years 1903 to 1907, inclusive. As to the other years, the plea of limitation interposed by the Cable Company was sustained and a recovery for the license tax for those years denied.

From the judgment against it for five hundred dollars for the license tax for the years named, the Cable Company appeals, and from the judgment dismissing its petition seeking to recover the license tax for the preceding five years, the city prosecutes a cross appeal.

It is first insisted that the ordinance bestowed no rights on the Telegraph Company and is void. The argument in support of this proposition is that the acceptance by the Postal Telegraph Cable Company, of New York, of the Congressional legislation of 1866 conferred upon it the right granted by the Federal government to erect its poles and string its wires in the city of Newport and elsewhere in the country without asking the consent of any city it might desire to operate in. This Congressional legislation, however, did not

take from the city the right to charge a telegraph company
119 for using its streets a reasonable compensation in the way of a license fee or occupation tax. It was expressly so held in City of St. Louis v. Western Union Telegraph Co., 148 U. S. 92, 37 L. Ed., 380. In that case the Western Union resisted the right of the city of St. Louis to charge it five dollars per annum for each pole it erected in the city, upon the ground that its acceptance of the Congressional legislation referred to entitled it to the use of the streets without compensation; but the court said that notwithstanding this legislation the city had authority to charge for the use of its streets and public places. To the same effect is Western Union Tel. Co. v. City of Richmond 224 U. S., 160, 56 Law Ed. 710. It was also so ruled by this court in the Postal Telegraph Company case, supra.

Another contention is that neither the Constitution nor the laws of the State of Kentucky require that a telegraph company shall obtain the consent of a municipality before constructing its lines in the streets of a city. But we do not find it necessary in this case to go into a discussion of this question. The city granted to the Postal Telegraph Cable Company, of New York, and its successors,—one of them being the present appellant, the right to occupy with its poles and wires the streets and public ways of the city in consideration of the payment to it by the company of one hundred dollars a year.

120 Under the authority of the ordinance, the validity or effect of which we will not now stop to consider, the grantee in the ordinance, and its successors, have been occupying the streets and public ways, and it will not now be heard to say, after it has had the use of the streets and public ways under these circumstances, that the city had no authority to grant it this privilege or to exact from it this tax. The city and the company entered into this agreement. The city has complied with its part of the undertaking, and the company must comply with its part. If the appellant company were now for the first time asserting the right to occupy the streets free from the burden of any license fee or tax for its occupation, we would have before us the question it is sought to raise in this case. But it has been in the possession of the streets since the passage of the ordinance, as we must and do presume, under and by virtue of it, and should pay for its use and occupation the agreed price.

The ordinance expressly states that it is not to be construed as granting a franchise to the company, and doubtless it was well known that a franchise such as is contemplated and required by the Constitution could not be secured in this way. In accepting the use of the streets under this ordinance, the company merely obtained the right, for the stipulated compensation, to occupy the streets until such time as the city might see proper to revoke the license. But so long as the company occupies the streets under the license, it must pay the agreed price.

121 The compensation provided by the ordinance is not a license tax upon the right of the company to do business in the city but merely a charge against the company for the use of the

streets with its poles and wires. The principles announced in the cases of the Cumberland Telephone & Telegraph Co. v. Hopkins, 121 Ky., 850, Adams Express Co. v. Boldrick, 141 Ky., 111, and Cumberland Telephone & Telegraph Co. v. Calhoun, 151 Ky., 241, have not, as we think, any controlling effect on this case.

Nor is there any merit in the assertion that the present appellant is not obligated to pay this so-called license tax, notwithstanding it was settled in the previous decision that its predecessor was liable for it. The ordinance expressly granted the privilege described in it to the Postal Telegraph Cable Company, of New York, and its successors. The present appellant is the successor of that company and is using the streets in the same manner that its predecessor did. Its predecessor was required by this court to pay the compensation and so should the present appellant pay it. This question we regard as settled by the former decision, as likewise is the contention that the exaction of one hundred dollars per annum for the use of the streets is unreasonable.

The claim is further made that the enforcement of this ordinance denies to the appellant the equal protection of the laws, in contravention of section one of the Fourteenth Amendment to the Constitution of the United States. Presenting this defense, it
122 averred in its answer, "one or more other telegraph companies have erected and maintained, and were during the years 1899 to 1908, inclusive, and are now maintaining in the City of Newport a system of telegraph poles and lines, and also one or more telephone companies have used the streets and alleys of the said City for its poles and wires in a manner substantially similar to the system of telegraph poles and lines owned, operated and maintained by the said New York Company and by the defendant in said City, and that none of these companies other than the defendant is subject to the payment of any license tax similar to that attempted to be exacted from the defendant by and under the provisions of the pretended ordinance set out in the petition and for the payment of which this action is brought, and said other telegraph and telephone companies were admitted into the City of Newport and were permitted to erect their poles and lines in the streets and alleys of the city of Newport without being compelled or required and without agreeing, either before, or at the time of said admissions or since, to pay or make any compensation whatsoever to said City by way of rental, license or otherwise."

It would appear from the ordinance that it was adopted by the council pursuant to some arrangement or understanding made between the council and the company but however this may be the authority conferred by the ordinance was a mere license revocable by
the city at any time upon reasonable notice and conditions.
123 It did not obligate the city to grant the use of its streets and public ways to the company for any specified period, or oblige the company to pay the stipulated compensation for any longer time than it chose to accept the rights granted by the ordinance.

There is no averment in the answer that any other telegraph company is occupying the streets of Newport under a grant like the one

conferred by this ordinance. Other companies may be using, a averred in the answer, "the streets and alleys of the said city with i poles and wires in a manner substantially similar to the system o telegraph poles and lines owned, operated and maintained by th defendant"; but this falls far short of saying that any of these com panies are so occupying the streets under an ordinance like the on here in question. It is also possible, although it does not appear i the record that other telegraph companies occupying the streets, a quired the right to do so before the adoption of the present constitu tion. It is also probable that other telegraph companies are occupy ing the streets under authority of franchises purchased from th city pursuant to the present Constitution.

Cities may, under dissimilar grants, confer dissimilar rights an privileges, and a corporation accepting a privilege under one gran cannot complain that other corporations are occupying the stree under different grants that imposed other conditions. The equa protection clause of the Federal Constitution is not violated unle there has been exacted from the complaining party a charge o compensation not imposed on other persons who acquire
124 their rights in substantially the same manner as the com plaining party. It is not enough that the complaining part and the other parties are engaged in substantially the same cha acter of business. The business must be pursued under a like gran In other words, all the conditions and circumstances surroundin the grant, as well as its exercise, must be substantially the same.

Cities have a right to make reasonable classifications of grants, an privileges, and have a right to attach dissimilar conditions and im pose dissimilar burdens upon each class. It is only when differe burdens are imposed upon persons in the same class, holding unde the same or similar grants, that there will be a violation of the equa protection feature of the Federal Constitution. When classificatio is allowable the discrimination must exist in the class to which th particular grant or privilege applies and be an attempt to impo upon the complaining party in that class burdens that are not im posed upon others in that particular class, and we find no such sta of case developed in the record. Hayes v. Missouri, 120 U. S., 6 30 Law Ed., 578; Gulf R. R. v. Ellis, 165 U. S., 148, 41 Law Ed 666; Southern R. Co. v. Greene, 216 U. S., 400, 54 Law Ed., 536.

Really, so far as the original appeal in this case is concerned, w might have contented ourselves by merely a reference to and a adoption of the opinion in the former case, as we regard every m terial question in this case as settled by that. But having agai briefly outlined the reasons upon which an affirmance of th
125 original appeal may be rested, we wish to make it plain th we put our decision upon the ground that as the cable com pany accepted whatever rights the ordinance conferred, it must pa the stipulated compensation so long as it chooses to or is permitted avail itself of the right to occupy the streets under the ordinance.

Coming now to consider the cross-appeal, we think the five ye statute of limitation applies. Section 2515 of the Kentucky Statut reads in part: "An action upon a contract not in writing, signed b

the party, express or implied, * * * shall be commenced within five years next after the cause of action accrued."

If this statute is applicable to municipalities, it clearly controls this case, because the liability of the cable company arises upon an implied contract not in writing to pay a stipulated compensation. If this were a contract between individuals or private corporations, there could of course be no doubt about the correctness of this proposition, but it is argued by counsel for the city that a different rule should obtain where a municipal corporation is involved; or, in other words, that the statute of limitation has no applicability to municipal corporations.

We do not, however, find in the statute any suggestion looking toward the exemption of municipal corporations from its operation. In fact there is no mention of municipal corporations in the statute,
except in section 2546, which is confined to actions for the re-
126 covery of streets and public ways. It is, however, provided in
section 2523 that "The limitations prescribed in this chapter shall apply to actions brought by or in the name of the Commonwealth, in the same manner as to actions by private persons, except where a different time is prescribed by some other chapter in this revision."

A municipality being a mere political sub-division of the State, it would seem to follow by analogy as well as implication that the limitations prescribed should apply to municipalities except where a different time was prescribed. It will be observed that this action on the part of the city is simply for the recovery of money on an implied contract, and we do not find any authority, statutory or otherwise, that would exempt it from the operation of the statute cited: Dillon Municipal Corporations, 4th Edition, section 675; Metropolitan Railroad Co. v. District of Columbia, 132 U. S. 1, 33 L. Ed. 231.

Wherefore, the judgment is affirmed on the original and cross-appeal.

Morison R. Waite, Cincinnati, O.; T. P. Carothers, Newport, Ky.; John R. Schindel, Cincinnati, for Appellant.
Otto Wolff, Newport, Ky., for Appellee.

[Endorsed:] Oct. 13, '14. Postal Tel. Cable Co. v. City of Newport.

127 Be it Remembered that on the 11th day of September, 1916, the plaintiff in error by its attorney filed in the office of the Clerk of the Court of Appeals of Kentucky, Petition for Writ of Error, and which is in words and figures as follows:

THE POSTAL TELEGRAPH-CABLE COMPANY, a Corporation under the Laws of Kentucky, Appellant,

vs.

THE CITY OF NEWPORT, KENTUCKY, Appellee.

Petition for Writ of Error.

To the Honorable The Chief Justice of the Court of Appeals, Commonwealth of Kentucky:

The Postal Telegraph-Cable Company, a corporation under the laws of Kentucky, prays for a writ of error from the Supreme Court of the United States to review the final judgment rendered against it in the suit above entitled on the 13th day of October, 1914, by the Court of Appeals, Commonwealth of Kentucky, that being the highest court of the State in which a decision in the suit could be
128 had, and files herewith an assignment of the errors complained of.

Wherefore, said The Postal Telegraph-Cable Company prays that upon its giving bond as required by law, said judgment of October 13, 1914, be superseded and all proceedings in this court and in the Circuit Court of Campbell County, Kentucky, be suspended and stayed.

THE POSTAL TELEGRAPH-CABLE COMPANY,
By MORISON R. WAITE,
JOHN R. SCHINDEL,
Its Attorneys.

Which Petition for Writ of Error is endorsed: Filed on the 11th day of September, 1916. R. W. Keenon, C. C. A.

129 Be it remembered that on the 11th day of September, 1916, the Plaintiff in error by *it* its attorney filed in the office of the Clerk of Court of Appeals of Kentucky, Assignment of Errors.

Court of Appeals of Ky.

THE POSTAL TELEGRAPH-CABLE COMPANY, a Corporation under the Laws of Kentucky, Appellant,

vs.

THE CITY OF NEWPORT, KENTUCKY, Appellee.

Assignment of Errors.

The Postal Telegraph Cable Company respectfully submits that in the record and proceedings, decision and judgment of the Court of Appeals, Commonwealth of Kentucky, in the above entitled matter there is manifest error in this, that said court erred in not re-

g the judgment of the Circuit Court of Campbell County, cky, for the following reasons:

t. The ordinance of the City of Newport approved December 95, which was held by said court to be binding upon the plaintiff in error, and which imposed upon The Postal Telegraph-Cable Company of New York, a predecessor of the plaintiff in error, a special license tax of $100 per annum e privilege of erecting, maintaining and operating its tele- lines over the streets of the City of Newport, was and is a and restriction upon interstate commerce and an inter- e therewith, and with the right and power of Congress to te interstate commerce and to establish post roads under Sec- of Article 1 of the Constitution of the United States.

nd. The ordinance of the City of Newport approved Decem-, 1895, which was held by said court to be binding upon the ff in error, and which imposed upon the Postal Telegraph-Company of New York, a predecessor of the plaintiff in error, al license tax of $100 per year for the privilege of erecting, ining and operating its telegraph lines on the streets of the f Newport, denied the right of the Postal Telegraph-Cable ny of New York, and does now deny the right of plaintiff in error to so erect, maintain and operate such telegraph lines by virtue of the provisions of the Act of Congress of July 24, 1866, entitled "An Act to Aid in the Construction egraph Lines and to Secure to the Government the Use of me for Postal, Military and Other Purposes" and Acts amend- thereof, and the Act of Congress of March 1, 1884, making blic roads and highways post roads while such roads and ays are kept up and maintained as such.

d. The City of Newport, Kentucky, by the ordinance ap- December 18, 1895, and which was held by said court to ding upon this plaintiff in error, imposed a special license $100 per annum upon The Postal Telegraph-Cable Company York, a predecessor of the plaintiff in error, for the privilege ting, maintaining and operating its lines over the streets of ty of Newport, and said City not having by said ordinance erwise imposed a similar tax upon any other telegraph or ne company so using the streets of said City, the plaintiff r is deprived of the equal protection of the laws in contra- n of Section One of the Fourteenth Amendment to the Con- stitution of the United States.

Fourth. The ordinance of the City of Newport approved December 18, 1895, imposed no obligation upon this plain- error and said Court of Appeals erred in holding that said nce, especially the provision requiring The Postal Telegraph- Company of New York, a predecessor of the plaintiff in to pay a special license tax of $100 per annum, was bind- on and enforcible against plaintiff in error.

h. The Postal Telegraph-Cable Company of New York, a ssor of plaintiff in error, never having accepted said ordi- of the City of Newport, approved December 18, 1895 in

accordance with its terms, was not obligated to pay the special license tax of $100 per annum thereby imposed and said court erred in holding that plaintiff in error was obligated to pay said tax.

Sixth. Said court erred in holding that the adjudication in a former case against The Postal Telegraph Cable Company of New York, a predecessor of the plaintiff in error, was binding upon plaintiff in error.

133 Wherefore, The Postal Telegraph-Cable Company prays that said judgment of the Court of Appeals of Kentucky may be reversed and that it may have an adjudication and judgment in its favor.

MORISON R. WAITE,
JOHN RANDOLPH SCHINDEL,
Attorneys for The Postal Telegraph Cable Company, Plaintiff in Error.

Which Assignment of Errors is endorsed: Filed on the 11th day of Sept. 1916. R. W. Keenon, C. C. A.

134 Be it remembered that on the 11th day of Sept. 1916, the plaintiff in error by its Attorney filed in the Office of the Clerk of the Court of Appeals of Kentucky, a writ of error which is in words and figures as follows:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the Commonwealth of Kentucky, Greeting:

Because in the record and proceedings as also in the rendition of the judgment, of a plea which is in the said Court of Appeals, Commonwealth of Kentucky, before you, or some of you being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Postal Telegraph-Cable Company, a corporation under the Laws of Kentucky, and the City of Newport, Kentucky, wherein was drawn in question
135 the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein a title, right, privilege or immunity was claimed under the Constitution, or any treaty, or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege or immunity specially set up or claimed under any clause of the said Constitution, treaty, statute, commission or authority, a manifest error hath happened to the great damage of the said The Postal-Telegraph-Cable Company as by its complaint appears, we being willing that error, if any there hath been, should be duly corrected and full and speedy justice

done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid
136 with all things concerning the same to the Supreme Court of the United States together with this writ so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 11th day of September, in the year of our Lord One Thousand Nine hundred and Sixteen (1916).

[Seal U. S. District Court, East. Dist. of Ky., — of America.]

J. W. MENZIES,
Clerk of District Court of the United States for the Eastern District of Kentucky.

Allowed by:
W. E. SETTLE,
Acting Chief Justice, Court of Appeals, Commonwealth of Kentucky.

Which Writ of Error is endorsed; Filed Sept. 11th, 1916. R. W. Keenon, C. C. A.

137 Be it remembered that of the 11th day of Sept., 1916, the Plaintiff in error by its attorney filed in the Office of the Clerk of the Court of Appeals of Kentucky the Order allowing Writ of Error, which is in words and figures as follows:

Court of Appeals of Kentucky.

THE POSTAL TELEGRAPH-CABLE COMPANY, a Corporation under the Laws of Kentucky, Appellant,
vs.
THE CITY OF NEWPORT, KENTUCKY, Appellee.

Order Allowing Writ of Error.

This 11th day of September, 1916, came the Postal Telegraph-Cable Company by its attorneys and filed herein and presented its petition for a writ of error from the Supreme Court of the United States to reverse the judgment entered herein on the 13th day of October, 1914, and filed with said petition an assignment of the errors complained of.

138 On consideration whereof, it is ordered by this court, it being the highest court of the State in which a decision in this suit can be had, that said writ of error be and the same is hereby granted and allowed upon said Company giving bond in the sum of $1,500.00 which shall operate as a supersedeas, and upon the ap-

proval of said bond, said judgment shall be superseded and all proceedings in this court and the Circuit Court of Campbell County, Kentucky, shall be stayed and suspended.

W. E. SETTLE,
Acting Chief Justice, Court of Appeals,
Commonwealth of Kentucky.

Which order allowing Writ of Error is endorsed; Filed on the 11th day of Sept. 1916. R. W. Keenon, C. C. A.

139 Be it remembered that on the 11th day of September 1916, the Plaintiff in error by its attorney filed in the office of the Clerk of the Court of Appeals of Kentucky, the Bond on Writ of Error, which is in words and figures as follows:

Bond on Writ of Error from Court of Appeals of Kentucky to the Supreme Court of the United States.

Know all men by these presents that We, The Postal Telegraph-Cable Company, a corporation under the laws of Kentucky, as Principal, and the American Surety Company of New York, as Surety, are hereby held and firmly bound unto the City of Newport, Kentucky, in the full and just sum of Fifteen hundred dollars to be paid to said Obligee, its certain attorneys, successors or assigns to the payment of which well and truly to be made we hereby bind our-
140 selves and our successors jointly and severally by these presents.

Sealed with our seals and dated this 11th day of September in the year of our Lord One Thousand Nine Hundred and Sixteen (1916).

Whereas, lately at a term of the Court of Appeals of Kentucky, in a suit pending in said court between the Postal Telegraph-Cable Company and the City of Newport, Kentucky, a judgment was rendered affirming a judgment of the Circuit Court of Campbell County, Kentucky, against the said The Postal Telegraph Cable Company for $500 and it has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment entered in the above entitled action by said Court of Appeals of the State of Kentucky and filed a copy thereof in the Clerk's office of said Court and a citation directed to the said City of Newport, Kentucky, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be held at the City of Washington within thirty days after the date of the said citation.

141 Now, therefore, the condition of this obligation is such that if the above named The Postal Telegraph Cable Company shall prosecute said writ of error to effect and answer all damages

and costs if it fail to make its plea good, then the above obligation to be void, otherwise to be and remain in full force and virtue.

THE POSTAL TELEGRAPH CABLE COMPANY,
By JOHN R. SCHINDEL, *Its Attorney.*
AMERICAN SURETY COMPANY OF NEW YORK,
By HOWARD ECKER,
Resident Vice-President.

Attest:
WERNER OPES,
Resident Ass't Secretary. [SEAL.]

Sealed and delivered in the presence of:
R. W. KEENON,
Clerk Court of Appeals of Kentucky.

Approved By:
W. E. SETTLE,
Acting Chief Justice Court of Appeals, Commonwealth of Kentucky.

Which Bond on Writ of Error is endorsed as follows: Filed Sept. 11th, 1916. R. W. Keenon, C. C. A.

142 Be it remembered that on the 13th day of Sept. 1916, the Plaintiff in Error by its attorney filed in the office of the Clerk of Court of Appeals of Kentucky a citation which is in words and figures as follows:

UNITED STATES OF AMERICA, *ss:*

To the City of Newport, Greeting:

Your are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States at Washington, District of Columbia, within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's office of the Court of Appeals of the Commonwealth of Kentucky wherein The Postal Telegraph-Cable Company, a corporation under the laws of Kentucky, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be cor-
143 rected and why speedy justice should not be done to the parties in that behalf.

Witness The Honorable W. E. Settle, Acting Chief Justice of the Court of Appeals of the Commonwealth of Kentucky, this 11th day of September in the year of our Lord One Thousand Nine Hundred and Sixteen (1916).

W. E. SETTLE,
Acting Chief Justice, Court of Appeals, Commonwealth of Kentucky.

Service acknowledged this 12th day of September, 1916.
CITY OF NEWPORT, KY.,
By A. J. LIVINGSTON, *Mayor.*

Which Greeting is endorsed as follows: Filed Sept. 13th 1916. R. W. Keenon, C. C. A.

144 Be it remembered that on the 13th day of Sept. 1916, the Plaintiff in Error by its attorney filed in the office of the Clerk of the Court of Appeals of Kentucky, the Præcipe for Record, and which is in words and figures as follows:

Court of Appeals of Kentucky.

THE POSTAL TELEGRAPH-CABLE COMPANY, a Corporation under the Laws of Kentucky, Appellant,
vs.
THE CITY OF NEWPORT, KENTUCKY, Appellee.

Præcipe for Record.

Hon. Rodman W. Keenon, Clerk Court of Appeals of Kentucky:

The Postal Telegraph-Cable Company, having been allowed a writ of error to the Supreme Court of the United States, hereby indicates the portions of the record in this court to be incorporated into the record on such writ of error:

145 The entire record of the Circuit Court of Campbell County, Kentucky as filed in the Court of Appeals.

The Entire record in the Court of Appeals, including the opinion of the court.

Petition for writ of error.
Assignment of errors,
Order allowing writ of error,
Bond on writ of error,
Citation and service,
Writ of Error.

WAITE, SCHINDEL AND BAYLESS,
Counsel for the Postal Telegraph-Cable Company.

Service of the foregoing Præcipe is hereby acknowledged, this 12th day of September, 1916.

CITY OF NEWPORT, KY.,
By A. J. LIVINGSTON, *Mayor.*

Which Præcipe for Record is endorsed as follows: Filed Sept. 13th, 1916. R. W. Keenon, C. C. A.

146 STATE OF KENTUCKY,
Court of Appeals:

I, Rodman W. Keenon, Clerk of the Court of Appeals of the State of Kentucky, certify that the foregoing constitutes a true and com-

plete copy of record called for in the Præcipe filed by the Appellant, now Plaintiff in Error in the case of Postal Telegraph Cable Company, Appellant, now Plaintiff in Error against City of Newport, Appellee now Defendant in Error, to be used by said Appellant now Plaintiff in Error, upon a writ of error from a judgment of the Court of Appeals of Kentucky, to the Supreme Court of the United States.

In testimony whereof, witness my hand and seal at Frankfort, Kentucky this September 16th, 1916.

[Seal Kentucky Court of Appeals.]

RODMAN W. KEENON,
Clerk of the Court of Appeals of Kentucky.

147 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the Commonwealth of Kentucky, Greeting:

Because in the record and proceedings as also in the rendition of the judgment, of a plea which is in the said Court of Appeals, Commonwealth of Kentucky, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Postal Telegraph-Cable Company, a corporation under the laws of Kentucky, and the City of Newport, Kentucky, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein a title, right, privilege or immunity was claimed under the Constitution, or any treaty, or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege or immunity specially set up or claimed under any clause of the said Constitution, treaty, statute, commission or authority, a manifest error hath happened to the great damage of the said The Postal Telegraph-Cable Company as by its complaint appears, we being willing that error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be
148 done.

Witness The Honorable Edward Douglass White, Chief

Justice of the United States, this 11th day of September in the year of our Lord One Thousand Nine Hundred and Sixteen (1916).

[Seal U. S. District Court, East. Dist. of Ky., U. S. of America.]

J. W. MENZIES,
Clerk of District Court of the United States for the Eastern District of Kentucky.

Allowed By:
W. E. SETTLE,
Acting Chief Justice, Court of Appeals, Commonwealth of Kentucky.

148½ [Endorsed:] Filed Sep. 11, 1916. R. W. Keenon.

149 UNITED STATES OF AMERICA, *ss:*

To the City of Newport, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States at Washington, District of Columbia, within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's office of the Court of Appeals of the Commonwealth of Kentucky wherein The Postal Telegraph-Cable Company, a corporation under the laws of Kentucky, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness The Honorable W. E. Settle, Acting Chief Justice of the Court of Appeals of the Commonwealth of Kentucky, this 11th day of September in the year of our Lord One Thousand Nine Hundred and Sixteen (1916).

W. E. SETTLE,
Acting Chief Justice Court of Appeals, Commonwealth of Kentucky.

Service acknowledged this 12 day of September, 1916.
CITY OF NEWPORT, KY.,
By A. J. LIVINGSTON, *Mayor.*

149½ [Endorsed:] Filed Sep. 13, 1916. R. W. Keenon.

Endorsed on cover: File No. 25,506. Kentucky Court of Appeals. Term No. 676. The Postal Telegraph-Cable Company, plaintiff-in-error, vs. The City of Newport, Kentucky. Filed September 26th, 1916. File No. 25,506.

INDEX.

CASES CITED.

Supreme Court of the United States.

OCTOBER TERM, 1917.

THE POSTAL TELEGRAPH-CABLE COMPANY,
Plaintiff in Error,

No. 273. *vs.*

THE CITY OF NEWPORT, KENTUCKY,
Defendant in Error.

Brief for Defendant in Error.

STATEMENT OF THE CASE.

In 1895 the Council of the City of Newport, Kentucky, adopted an ordinance granting to the Postal Telegraph-Cable Company and its successors the right and privilege of erecting poles and stretching wires through the streets and alleys of the City of Newport. The ordinance contained several sections defining the rights of the city and the company, and provided, amongst other things, "nor shall anything in this ordinance be construed as granting a franchise to the said Postal Telegraph-Cable Company." In Section 7, it was provided that: "the said Postal Telegraph-Cable Company shall pay to the City of Newport a special license tax of $100 per annum."

In 1899 the City brought suit against the Cable Company to recover the $100 license tax for the years 1897 and 1898 and from a judgment awarding it this sum the Cable Company prosecuted an appeal to the Court of Appeals of the State of Kentucky, where the judgment of the lower court was affirmed in an opinion that may be found in 76 S. W., 159, 25 Ky. Law. Rep., 635. This judgment is in full force and effect and has never been modified, reversed or set aside.

In 1897 the Cable Company, which it appears was a New York corporation, sold and conveyed its property in the state of Kentucky, including all rights and interests it had in the City of Newport, to the Commercial Cable Company, another New York corporation.

In 1898 the Commercial Cable Company sold and conveyed all of its property, rights and privileges to the Commercial Cable & Telegraph Company, also a New York corporation.

In December, 1900, this company sold its property, rights and privileges to the plaintiff in error, which is a Kentucky corporation, and since then it has owned, operated and controlled the poles and wires and other property of its predecessors in the City of Newport, and occupied the streets and public ways of the City, under the ordinance referred to.

In 1908 this suit was brought seeking to recover from the original grantee, under the ordinance, the Postal Telegraph Cable Company, of New York, the special annual license tax of $100 for the years 1899 to 1907 inclusive, but by an amended petition the plaintiff in error was made a defendant and the case against the New York corporation was dismissed. In the suit plaintiff in error set up a number of defenses, and after the case had been submitted on the pleadings and ex-

hibits, there was a judgment against it for the license tax due for the years 1903 to 1907 inclusive. As to the other years, plea of limitation interposed by the Cable Company, was sustained, and recovery for those years denied.

From judgment against it for the $500 for the license tax for the years named, the Cable Company appealed and the Court of Appeals of Kentucky affirmed the judgment of the lower court. That judgment is now here for review on writ of error.

We do not feel that anything can be added to the argument so fully and strongly made in support of the contentions made by defendant in error by the two opinions of the highest court of the State of Kentucky.

RES ADJUDICATA.

The plaintiff in error acquired its rights herein subject to the previous adjudication and chargeable with notice of the judgment in the case of *Postal Telegraph Cable Company* v. *The City of Newport*, the opinion in which case may be found in 76 S. W., 159, 25 Ky. Law Rep., 635, in which case the appellant was the predecessor in interest and in privity with and the grantor of all the rights and privileges of the plaintiff in error herein, every question having been raised in that case that has been raised in this case and decided adversely to plaintiff's in error predecessor and the judgment in that case never having been modified, reversed or set aside.

In *Scotland County* v. *Hill*, 132 U. S., 107, it was held:

> "An adjudication in a State Court which binds the plaintiff whether it was right or

wrong, concludes him until it has been reversed or set aside. It can not be disregarded in the Courts of the United States any more than in those of the States." Syl.

In *Minneapolis Agricultural and Mechanical Association* v. *Canfield*, 121 U. S., 295, it was held:

"Upon a bill filed by the appellee to establish his equities in the capital stock of the corporate property of the Minneapolis Agricultural and Mechanical Association as against the claims of the State National Bank, it is held:

"That a former judgment by a State Court, to the effect that a conveyance by the directors of said association was defective to convey the legal title to the complainant, as against the bank which held the capital stock as a pledge, is conclusive as between the parties and those in privity with them, that the bank by an agreement to accept Northern Pacific Railroad bonds for its stock did not release said pledge, that the complainant's equity under said judgment consisted of a right to redeem the pledge to the Bank, and that he is entitled to enforce his said right against certain holders from the Bank, who appear from the evidence to be holders with notice of his equity." Syl.

In *The Tioga Railroad Company* v. *Blossburg & Corning Railroad Company*, 20 Wall., 137, the Court decided:

"Where a point has been decided in a state court, it is *res judicata* between the parties. It can not be litigated again on the same contract in a Federal Court."

The Court speaking through Mr. Justice Bradley in that case said:

"The Tioga Railroad Company is a corporation duly organized under the laws of Pennsylvania, and is the proprietor of a railroad extending from Blossburg, in that State, to the line between Pennsylvania and New York. The Blossburg & Corning Railroad Company is a corporation organized under the laws of the State of New York, and is the proprietor of a railroad connecting with the above mentioned road at the state line, and extending thence to Corning; the two roads forming a complete line of railroad from Blossburg to Corning. The latter Company acquired its part of the road by purchase in 1855, succeeding to the rights of a former company called the Corning and Blossburg Railroad Company. By contract made in 1851, the Corning or New York end of the line was leased to the Tioga Railroad Company, under certain terms and stipulations, amongst which was the following:

"For the use of the said railroad of the said Corning and Blossburg Railroad Company, and the use of their depots, engine-houses, machine-shops, grounds, water-stations, etc., The Tioga Railroad Company agrees to pay to the Corning and Blossburg Railroad Company two-thirds of the receipts for passengers, mails and freights which shall be taken for the said Corning and Blossburg Railroad, the expenses charged customers for the loading and unloading coal, lumber and other freights, and for the warehousing and such additional charges by way of discrimination as shall be made for short distances for motive power not to be included in the term 'receipts,' as above mentioned.

"The parties soon disagreed as to the meaning of the words 'such additional charges by way of discrimination as shall be made for short distances for motive power, not to be included

in the term "receipts," as above mentioned.' The Lessees claimed that they were entitled to keep any excess of way fares and freights for intermediate places and short distances above the through rates for those places, and did not account for, but retained the same. It is for this difference, running through many years, that the suit is brought. In January, 1855, the Blossburg Company brought a suit in the Supreme Court of New York against the Tioga Company, on the contract in question, in which this question of difference was litigated and decided in favor of the former company. Some attempt has been made to show that this question was not decided in that suit; but we have looked at the record and proceedings therein, which were in evidence in this case, and are satisfied that it was decided. The report of the case in 1 Keyes, 486, shows that it was the only question before the Court of Appeals, to which court the case was carried. This point, then is *res judicata* between the parties; it can not be litigated again on the same contract."

Mr. Justice Hunt in the concurring opinion used the following language:

"The Blossburg Company claimed to recover in this action two-thirds of all the receipts for transportation, under the tariff of rates, during the entire period of the running of the contract. The Tioga Company claimed to retain the difference resulting from the discrimination in the tariff of rates for short distances. The claim of the Blossburg Company was sustained in the court below. In a former suit upon the same contract, between the same parties, the Supreme Court and the Court of Appeals of the State of New York reached the same conclusion. That was an action to recover damages for the

violation of the contract in question during the first years of its existence. The present action seeks to recover damages for violation of the same contract, occurring after the commencement of the former action.

"The question whether, upon the merits, the plaintiff is entitled to recover, is no longer an open question. It was settled by the adjudication of the point by the highest courts of New York, in an action between the same parties and upon precisely the same facts. The record in the former suit was given in evidence in this suit, and is conclusive." *Thompson* v. *Roberts,* 24 How., 233 (65 U. S. XVI., 648); *Demarest* v. *Darg,* 32 N. Y., 281; *Doty* v. *Brown,* 4 N. Y., 71; 1 Greenl. Ev., Sec. 531 and n. 2, p. 700.

"A decree of the Supreme Court of the state settling the rights of property and questions in controversy is *res adjudicata* and conclusive in the Supreme Court of the United States to those who were parties to it."

Nichol v. *Levy,* 5 Wall., 433, 18 Led., 596.

"The judgment of a State Court upon a question is conclusive upon the same question in a subsequent suit in the United States Circuit Court between the same parties and is pleadable in bar to the subsequent suit."

Canjolle v. *Curtiss* (*Canjoulle* v. *Ferre*), 13 Wall., 465, 20 Led., 507, and cases cited.

"Where suits between the same parties in relation to the same subject matter are pending at the same time in State and Federal Courts of concurrent jurisdiction a judgment on the merits in the State Court may be used as a bar to further proceedings in the Federal Court."

Stout v. *Lye,* 103 U. S., 66, 26 Led., 428.

In *Cromwell* v. *County of Sac*, 94 U. S., 352, it was held that the judgment concluded:

> "The parties and those in privity with them not only as to every matter which was offered to sustain or defeat the claim but as to any other matter which might have been offered for that purpose."

Section 203 of the Constitution of Kentucky is as follows:

> "No corporation shall lease or alienate any franchise so as to relieve any franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges."

In the case of *The Postal Telegraph Cable Company* v. *Chicopee*, 207 Mass., 341-343 the Court in speaking of the Charter of the plaintiff in error herein, said by Chief Justice Knowlton:

> "By a series of conveyances through different corporations this line has passed into the ownership of plaintiff who holds it with all the rights and subject to all the liabilities of the original owner."

We have endeavored to cite to this Court its own decisions in so far as possible, but we desire to call the attention of the Court to the two following decisions in the Federal Reporter cited by plaintiff in error.

In *Aetna Life Insurance Company* v. *Board of Commissioners of Hamilton County, Kansas*, 117 Federal Reporter, 82-84, the Circuit Court of Appeals for the 8th Circuit speaking through Judge Sanborn, said:

"The only real question in the case, therefore, is this: Is a former judgment upon a general finding in favor of the defendant which does not disclose which one of several defenses was sustained, an estoppel of the plaintiff therein from maintaining a second action upon different causes of action against the same defendant in which the same defenses are interposed and the same issues are presented that were made in the earlier action? Counsel for the plaintiff argue with great force and persuasiveness that this question must be answered in the negative. They plant themselves upon the declaration of the Supreme Court in *Russell* v. *Place*, 94 U. S., 606, 608, 24 L. Ed., 214, that 'it is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.' They cite in support of their contention *Cromwell* v. *Sac County*, 94 U. S., 351, 24 L. Ed., 195;

Board v. *Sutliff*, 38 C. C. A., 167, 97 Fed., 270; *Packet Co.* v. *Sickles*, 5 Wall., 580, 18 L. Ed., 550; *Nesbit* v. *Independent Dist.*, 144 U. S., 610, 12 Sup. Ct., 746, 36 L. Ed., 562; *Railway Co.* v. *Leathe*, 84 Fed., 103, 28 C. C. A., 279; and *Bank* v. *Williams* (Wash.), 63 Pac., 511,—and they insist that, because the general finding and judgment in the first action do not indicate which one of the several defenses pleaded in both actions was litigated, nor upon which one the judgment was based, that judgment can not constitute an estoppel upon any one of these defenses or issues, and that every defense there presented may be again litigated in this action, unless the defendant proves by extrinsic evidence which one or more of them were actually litigated and determined in the former suit. The propositions that there is nothing in the record in the former action nor in the pleadings in this action that discloses which one of the several defenses interposed in both actions was sustained in the earlier one, and that, if it is essential to the estoppel in this case to determine this fact, this judgment can not stand, must be conceded. But how is the determination of the question whether one or another of these defenses was sustained in the earlier action essential to the establishment of the estoppel? The pleadings upon which this judgment stands show that the same issues are made and that the same defenses are interposed here that were made and interposed in the former action. The judgment in the earlier action is conclusive evidence that at least one of these defenses was sustained and that at least one of these issues was determined in favor of the defendant. By that judgment the plaintiff is estopped from again litigating that defense or that issue, and an estoppel from litigating one of many defenses or issues that are equally

fatal to his case would seem to be as conclusive and as fatal as an estoppel from litigating them all. The quotation from *Russell* v. *Place,* and the general declarations of the courts in the other cases cited, must be read in the light of the facts then under consideration by those courts. In that class of cases in which the second action presents a material issue or matter which may not have been raised, litigated, and decided in the former action it is undoubtedly essential to the estoppel to show what issue was litigated and decided and what question was determined in the earlier case, in order to determine whether or not the issue there determined embraced the matter in litigation in the second action. But where, as in the case at bar, the pleadings conclusively show that all the defenses made and all the issues joined are identical in the two actions, it is difficult to perceive how it can make any difference to which one of the defenses or issues the estoppel applies, because the mere fact that it does apply to one defense and to one issue is as fatal to the maintenance of the second action as it would be if it applied to all. When the opinions which have been cited by counsel for the plaintiff are carefully read, analyzed, and considered, they will not be found to be inconsistent with this distinction. The decisions which they cite all fall within the first class of cases to which we have adverted and fail to rule the question which is presented in the case in hand."

In *Harrison* v. *Remington Paper Company,* 140 Fed., 385-400, the Circuit Court of Appeals for the 8th Circuit, speaking through Judge Sanborn, said:

"The rules of estoppel applicable to this situation are: When the second suit is upon the same cause of action and between the same par-

ties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the former. When the second suit is upon a different cause of action, but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action, but it is not conclusive relative to other matters which might have been, but were not, litigated or decided. *Linton* v. *Ins. Co.*, 104 Fed., 584, 587, 44 C. C. A., 54, 57; *Commissioners* v. *Platt*, 79 Fed., 567, 571, 25 C. C. A., 87, 91; *Board* v. *Sutliff*, 38 C. C. A., 167, 171, 97 Fed., 270, 274; *Southern Pac. Co.* v. *U. S.*, 168 U. S., 1, 48, 18 Sup. Ct., 18, 42 L. Ed., 355; *Southern Minn. Ry. Extension Co.* v. *St. Paul & S. C. R. Co.*, 55 Fed., 690, 5 C. C. A., 249. Where the record is such that there is or may be a material issue, question, or matter in the second suit upon a different cause of action, which may not have been raised, litigated, and decided in the former action, the judgment therein does not constitute an estoppel from litigating this issue, question, or matter, unless by pleading or proof the party asserting the estoppel establishes the fact that the issue, question, or matter in dispute was actually and necessarily litigated and determined in the former action. *Russell* v. *Place*, 94 U. S., 606, 608, 24 L. Ed., 214; *Aetna Life Ins. Co.* v. *Board of Commissioners*, 54 C. C. A., 468, 474, 117 Fed., 82, 88; *Cromwell* v. *County of Sac*, 94 U. S., 351, 359, 24 L. Ed., 195; *Nesbit* v. *Independent District*, 144 U. S., 610, 619, 12 Sup. Ct., 746, 36 L. Ed., 562; *Railway Co.* v. *Leathe*, 84 Fed., 103, 105, 28 C. C. A., 279, 281."

PLAINTIFF IN ERROR MAKES INCONSISTENT DEFENSES.

This case was tried upon the pleadings and exhibits, and no evidence was introduced or offered to be introduced by plaintiff in error upon the reasonableness of this charge.

The plaintiff in error never complied with the Act of Congress, giving it the right to use post roads, etc. It claims this by succession from its predecessor in title. Yet it denies that it assumed any of the obligations entered into by its predecessors. This position is untenable.

It should be noticed that plaintiff in error states that the New York corporation complied with the Act of Congress and therefore has rights which the City can not affect. And that consequently the Kentucky corporation has like rights because it is the successor of the New York corporation.

But the Kentucky corporation has not complied with the Acts of Congress so far as the record discloses; nor is it claimed that it does an interstate business at all. It would therefore be regulated by and amenable to the state law alone and could not be protected by the Federal laws.

On the other hand plaintiff in error claims that it has nothing to do with the original corporation; is not bound by the adjudication; not bound by the grant to it.

In short, plaintiff in error claims that it inherits and exercises all the rights of the original New York corporation, including inferentially its consent to be governed by the Act of 1866 the post road law; but that it has nothing to do with the obligations of the original corporation.

Manifestly these positions are inconsistent and can not be sustained. Either plaintiff in error has all the rights and all the obligations of its predecessor in interest or it has none and in that event would be a trespasser upon the streets of the city. Plaintiff in error takes the position and rests its claims upon the former statement and it should not be permitted to blow hot and cold.

In *The City of Louisville* v. *The Cumberland Telephone & Telegraph Company*, 224 U. S., 649, it was held:

> "The right to use the city streets for telephone purposes, possessed by a telephone company under its charter, passed to the new corporation formed by consolidation conformably to Ky. Stat., Section 556, which declares that the consolidated company shall be vested with all the property, business, assets, and effects of the constituent companies, without deed or transfer and bound for all their contracts and liabilities."

The Court in this case said:

> "For while franchises to be, are not transferable without express authority, there are other franchises to have, to hold, and to use, which are contractual and proprietary in their nature, and which confer rights and privileges which can be sold wherever the company, as here, has power to dispose of its property. In the present case the Ohio Valley Company was by its charter given authority to mortgage and dispose of franchises. Among those thus held was the right to use the streets in the city for the purpose necessary in conducting a telephone business. Such a street franchise has been called by various names,—an incorporeal hereditament, an interest in land, an easement, a right

of way,—but, howsoever designated, it is property. *Detroit* v. *Detroit Citizens' Street R. Co.*, 184 U. S., 394, 46 L. Ed., 610, 22 Sup. Ct. Rep., 410; *Louisville City R. Co.* v. *Louisville*, 8 Bush., 415; *West River Bridge Co.* v. *Dix*, 6 How., 507, 534, 12 L. Ed., 535, 546; *Morristown* v. *East Tennessee Teleph. Co.*, 53 C. C. A., 132, 115 Fed., 304, 307. Being property, it was taxable, alienable, and transferable; and, as property, passed to the Cumberland Telephone & Telegraph Company under the express provisions of the Kentucky Statute, which, as of force in 1900, declared that the consolidated company should be 'vested with all the property, business, assets, and effects of the constituent companies, without deed or transfer, and bound for all their contracts and liabilities.'

"That the street lights, however designated, passed to the Cumberland Company, is the natural and obvious construction of the act. The plant and property of a telephone company are useless when dissevered from the streets, and there would, in effect, have been no property out of which to pay the debts or with which to perform the public duties imposed if the street rights of the constituent companies had not been transferred by the statute to the consolidated company. The Constitution (Sections 199 and 200), in providing for the incorporation and consolidation of telephone companies, evidently contemplated, as did the statute, that on this statutory union there should be a transfer of that franchise, right of way or property, which alone gave value to the plant, thereby preserving the investment which had been made for purposes of private gain and public use. The city itself so construed the general law, and thereupon demanded from the Cumberland Company, as successor of the Ohio Valley Company, the bond

for $50,000 called for in the ordinance of August 17, 1886."

EQUAL PROTECTION OF THE LAWS.

Plaintiff in error, a domestic corporation, was not denied the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Federal Constitution because other companies may have been authorized to use the streets of the city on less onerous terms, it not appearing that other companies were operating under similar grants to plaintiff in error.

In *Bowman* v. *Lewis* (*Missouri* v. *Lewis*), 101 U. S., 22, the Court said speaking of the Fourteenth Amendment to the Constitution:

> "It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

In *Hayes* v. *Missouri*, 120 U. S., 68, the Court by Mr. Justice Field said:

> "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed as we said in *Barbier* v. *Connolly* speaking of the Fourteenth Amendment, 'Class legislation discriminating against some and favoring others is prohibited'; but

> legislation which in carrying out a public purpose is limited in its application if within the sphere of its operation it affects alike all persons similarily situated is not within the amendment." 113 U. S., 27-32.

In *Walson* v. *Nevin*, 128 U. S., 578, the Court, speaking through Mr. Chief Justice Fuller, said:

> "And whenever the law operates alike on all persons and property similarily situated, equal protection can not be said to be denied." *Wurts* v. *Hoagland*, 114 U. S., 606; *Richmond, F. & P. R. R. Co.* v. *Richmond*, 96 U. S., 529.

In *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S., 150, the Supreme Court by Mr. Justice Brewer said:

> "But is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to a charge of denial of equal protection while as a general rule this is undeniably true." *Hayes* v. *Missouri*, 120 U. S., 68, *Missouri P. R.* v. *Mackey*, 127 U. S., 205; *Walston* v. *Nevin*, 128 U. S., 578; *Bello Gap R. R.* v. *Pennsylvania*, 134 U. S., 232; *Pacific Express Co.* v. *Seibert*, 142 U. S., 339; *Groza* v. *Tierman*, 148 U. S., 657; *Columbus S. R. Co.* v. *Wright*, 151 U. S., 470; *Merchant* v. *Pennsylvania R. R.*, 153 U. S., 380; *St. Louis & S. F. R. Co.* v. *Mathews*, 165 U. S., 1; yet it is equally true that such classification can not be made arbitrarily."

In *Southern R. R.* v. *Greene*, 216 U. S., 400, this Court through Mr. Justice Day said, page 412:

> "The equal protection of the laws means subjection to equal laws applying alike to all in the same situation,"

and at page 417, it is said:

> "While reasonable classification is permitted without doing violence to the equal protection of the laws such classification must be based upon some real and substantial distinction, bearing reasonable and just relation to things in respect to which such classification is imposed and classification can not be arbitrarily made without any substantial basis."

In *Lake Shore & Michigan Southern R. Company* v. *Clough*, 242 U. S., 375, this Court speaking through Mr. Justice Pitney said:

> "But it has been held many times the 'equal protection' clause does not deprive the states of power to resort to classification for purposes of legislation, and unless it appears that a state law as construed and applied by a State Court of last resort bases discriminations upon arbitrary distinctions we can not judicially declare that the State has refused to give equal protection of the laws."
>
> *Singer Sewing Machine Co.* v. *Brickel*, 233 U. S., 304.
>
> *Missouri, K. & T. R. Co.* v. *Cade*, 233 U. S., 642, 650.

> "The discriminations which are open to objections are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws." *Soon Hing* v. *Crowley*, 113 U. S., 703, 5 Sup. Ct. Rep., 730, 28 L. Ed., 1145.

BURDEN OF SHOWING UNREASONABLENESS OF ORDINANCE.

Burden of showing unreasonableness of ordinance is on plaintiff in error. The question of the reasonableness of the charge was not raised in the trial of the case as no evidence was taken and the case was tried merely upon the pleadings and exhibits. In *The Cumberland Telephone & Telegraph Co.* v. *City of Calhoun*, 151 Ky., 241, 151 S. W., 659, it was held:

> "The burden of showing that a municipal occupation or license tax is unreasonable, oppressive and confiscatory is upon the party attacking the tax and in the absence of evidence can not be held invalid on those grounds."

In *City of St. Louis* v. *Western Union Telegraph Company*, 148 U. S., 100, the Court said by Mr. Justice Brewer of an ordinance requiring the telegraph company to pay as rental $5 for each telegraph pole per year in the City of St. Louis, page 104:

> "The Court can not assume that such a charge is excessive, and so excessive as to make the ordinance unreasonable and void; for as applied in certain cases a like charge for so much appropriation of the streets may be reasonable."

In *Atlantic & Pacific Telegraph Company* v. *City of Philadelphia*, 190 U. S., 160, speaking of the reasonableness of an ordinance similar to the one under consideration herein, the Court said:

> "We pass therefore to consider the reasonableness of this license charge. *Prima facie* it was reasonable. *Western Union Telegraph Co.*

v. *New Hope*, 187 U. S., 419, 'It devolved upon the Company to show that it was not.' "

ACT OF 1866 DID NOT DEPRIVE THE CITY OF THE RIGHT TO CHARGE THE TELEGRAPH CO. A REASONABLE LICENSE TAX, OR RENTAL.

The Act of July 24, 1866, C. 230, 14 Stat. at L., 221, granting to telegraph companies, the right to erect poles and string wires on post roads did not deprive the city of the right to charge a company exercising such right a reasonable license tax or rental for such use.

In *City of St. Louis* v. *Western Union Telegraph Company*, 148 U. S., 92, the Court held as follows:

> "A charge imposed by a city for the privilege of using the streets, alleys, and public places, of the city, by a telegraph company, and which is graduated by the amount of such use, is not a privilege or license tax.
>
> "A city has a right to charge a telegraph company for the use of its streets and public places for telegraph poles erected therein.
>
> "A telegraph company has not, under the Act of Congress of July 24, 1866, and by virtue of its written acceptance of the provisions, restrictions, and obligations imposed by that Act, a right to occupy the streets of a city with its telegraph poles.
>
> "This court can not assume that a charge made to a telegraph company for the use of the streets of a city for its poles is excessive so as to make the ordinance of the city imposing the charge unreasonable and void; where a new trial is directed that question may be investigated on the subsequent trial."

In this case which is a leading case upon this subject Mr. Justice Brewer delivered the opinion of the Court and at page 100 said:

> "It is a misconception, however, to suppose that the franchise or privilege granted by the Act of 1866 carries with it the unrestricted right to appropriate the public property of a state. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it can not abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the Federal government to a corporation, state or national, to construct interstate roads or lines of travel, transportation, or communication would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a state. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the state, and construct its depot there, without paying the value of the property thus appropriated. Although the statehouse grounds be property devoted to public uses, it is property devoted to the public uses of the state, and property whose ownership and control is in the state, and it is

not within the competency of the national government to dispossess the state of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantee, without suitable compensation to the state. This rule extends to streets and highways; they are the public property of the state. While for purposes of travel and common use they are open to the citizens of every state alike and no state can by its legislation deprive the citizens of another state of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another state, or a corporation of the national government, it is within the competency of the state, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may, if it chooses, exact from the party or corporations given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated. This is not the first time that an effort has been made to withdraw corporate property from state control, under and by virtue of this Act of Congress. In *Western U. Teleg. Co.* v. *Massachusetts*, 125 U. S., 530 (31:790), the telegraph company set up that Act as a defense against state taxation, but the defense was overruled. Mr. Justice Miller, on page 548, speaking for the court, used this language:

"This, however, is merely a permissive statute and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United

> States, or over and under navigable streams or over bridges not built or owned by the Federal government, carries with it any exemption from the ordinary burdens of taxation. While the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines there , to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

This case was affirmed upon a petition for rehearing and the petition overruled in 149 U. S., 465. The Syllabus of which is as follows:

> "The City of St. Louis is authorized by the Constitution and laws of Missouri to impose upon a telegraph company putting its poles in the streets of the City, a charge in the nature of rental for the exclusive use of the parts so used."

It was held decisive of the case of *Postal Telegraph Cable Co.* v. *City of Baltimore*, 156 U. S., 210, the syllabus of which is as follows:

> "The City of Baltimore has the right to charge a telegraph company for the use of its streets by telegraph poles erected therein."

The opinion in the above case is as follows:

The Chief Justice: The judgment is affirmed upon the authority of *St. Louis* v. *Western U. Teleg. Co.*, 148 U. S., 92 (37:380).

It was cited with approval and followed in so far as applicable in the *City of Richmond* v. *Southern Bell Telephone Co.*, 174 U. S., 758, and *Western Union Telegraph Company* v. *City of Richmond*, 224 U. S., 160.

In *Western Union Telegraph Company* v. *New Hope*, 187 U. S., 419, it was held:

> "An ordinance imposing a license fee on telegraph poles and wires within the limits of the municipality is not obnoxious to the commerce clause of the Federal Constitution when applied to poles and wires used for interstate business, although it yields a return in excess of the amount necessary to reimburse the municipality for the cost of supervision and inspection."

In *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*, 190 U. S., 160, it was held:

> "A telegraph company, though engaged in interstate commerce, may be compelled by a municipality to pay a reasonable license fee for the enforcement of local government supervision of its poles and wires."

DID THE CITY HAVE THE RIGHT UNDER THE LAWS OF THE STATE OF KENTUCKY TO ENTER INTO THE CONTRACT OR GRANT THE RIGHTS THE SUBJECT OF THE ACTION HEREIN?

Section 199 of the Constitution of the State of Kentucky is as follows:

> "TELEGRAPH AND TELEPHONE COMPANIES. Any association or corporation, or the lessees or man-

agers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines, and said companies shall receive and transmit each other's messages without unreasonable delay or discrimination, and all such companies are hereby declared to be common carriers and subject to legislative control. Telephone companies operating exchanges in different towns or cities, or other public stations, shall receive and transmit each other's messages without unreasonable delay or discrimination. The General Assembly shall, by general laws of uniform operation provide reasonable regulations to give full effect to this section. Nothing herein shall be construed to interfere with the rights of cities or towns to arrange and control their streets and alleys, and to designate the places at which, and the manner in which, the wires of such companies shall be erected or laid within the limits of such city or town."

By Section 3058 of the Kentucky Statutes the General Council or Board of Commissioners of cities of the second class, of which Newport is one, has been delegated the power by the Legislature amongst other things "to license, tax and regulate telegraph, telephone and district messenger companies or corporations or institutions."

In *St. Louis* v. *Western Union Teleg. Co.*, 149 U. S., 465, the Court in discussing what authority was given to the City by the Charter which gave it the right to regulate the use of the telegraph Company said:

> "The determination of the amount to be paid for the use is as much a matter of regulation as determining the place which may be used or the size or height of the poles.

"The very argument made by the Court to show that fixing telephone charges is not a regulation of the use, is persuasive that fixing a price for the use is such a regulation."

THE QUESTION IS NOT INVOLVED WHETHER OR NOT THE USE OF THE STREETS BY THE TELEGRAPH COMPANIES FOR ITS POLES IS A NEW SERVITUDE.

In *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S., 92-99, the Court said:

"We do not mean to be understood as questioning the right of municipalities to permit such occupation of the streets by telegraph and telephone companies, nor is there involved here the question whether such use is a new servitude or burden placed upon the easement, entitling the adjacent lot owners to additional compensation."

THE ACT OF 1866 DID NOT GRANT TO TELEGRAPH COMPANIES THE RIGHT OF EMINENT DOMAIN.

In *The Western Union Telegraph Co.* v. *Pennsylvania R. R. Co. et al*, 195 U. S., 540, the Court said at page 568:

"We said in *Sweet* v. *Rechel*, 159 U. S., 380, 399, by Mr. Justice Harlan: 'It is a condition precedent to the exercise of such power (eminent domain) that the statute make provision for reasonable compensation to the owner.'"

It will be observed that the act of 1866, the post road law, made no provision for "compensation to the owner."

AUTHORITIES CITED BY PLAINTIFF IN ERROR.

We do not think any of the authorities cited by plaintiff in error are apposite to its contention in this case. We have read all the cases cited by counsel carefully but to illustrate our contention we only want to call attention to the fact that after plaintiff in error had filed its brief counsel added the following thereto which is pasted at the bottom of page 38:

> "This discrimination is emphasized by the decisions of the Court of Appeals of Kentucky in *Cumberland Tel. Co.* v. *Hopkins*, 121 Ky., 850, and *Adams Express Co.* v. *Boldrick*, 141 Ky., 111, holding that municipalities have no authority to levy license taxes against telephone, telegraph or express companies. This principle was laid down by the Court after its decision in the first Postal Case and reaches back and renders the license tax sustained by the Court in this case void."

Counsel for plaintiff in error subsequently filed a supplemental brief in which they practically only discussed and relied upon the following cases:

Cumberland Telephone & Telegraph Co. v. *Hopkins*, 121 Ky., 850.
Adams Express Co. v. *Boldrick*, 141 Ky., 111, and
Cumberland Telephone & Telepgraph Co. v. *Calhoun*, 151 Ky., 241,

and contend as these cases were decided after the first Postal Telegraph Co. Case herein, that they reached back

to and had the effect of reversing the former case. Judge Carroll who wrote the opinion in this case in the Court of Appeals of Kentucky also wrote the opinions in the case of *Adams Express Co.* v. *Boldrick*, 131 Ky., 111, and *Cumberland Telephone Co.* v. *Calhoun*, 151 Ky., 241, the two latest cases relied upon by plaintiff in error and Judge Carroll said in the opinion of the Court below in this case in reference thereto the following:

> "The principles announced in the cases of the *Cumberland Telephone & Telegrah Co.* v. *Hopkins*, 121 Ky., 850, *Adams Express Co.* v. *Boldrick*, 141 Ky., 111, and *Cumberland Telephone & Telegraph Co.* v. *Calhoun*, 151 Ky., 241, have not, as we think, any controlling effect on this case."

We desire to call the attention of the Court to the fact that the Court of Appeals of Kentucky the court of highest jurisdiction in that state at periods eleven years apart, when the personnel of the court had almost entirely changed, twice decided this case and all the matters therein involved unanimously in favor of defendant in error.

BRENT SPENCE,
Counsel for Defendant in Error.

APPENDIX.

Opinion of the Court of Appeals in Former Case, By Judge Hobson.

(Decided October 14, 1903.)

76 S. W., 159; 25 Ky. Law Rep., 635.

The City of Newport by an ordinance of December 5, 1895, granted to the Postal Telegraph-Cable Company the right to use the streets and alleys of the City for the purpose of erecting its poles and stringing its wires, and it was provided in the ordinance that the Company should pay the City a license tax of one hundred dollars per annum. This suit was filed on September 9, 1899, by the City against the Company; it was alleged in the petition that the defendant secured from the plaintiff the use of its streets for the purpose named, by the ordinance referred to; and that thereunder the defendant had erected its poles and strung its wires in the streets and alleys of the City and had since enjoyed the rights and privileges granted to it and had thereby accepted the ordinance, but that in disregard of its contract it had failed to pay the City the one hundred dollars due for the year ending December 5, 1897, or for the year ending December 5, 1898. A copy of the ordinance was filed with the petition as an exhibit and judgment was prayed for the two hundred dollars due. The defendant filed an answer in which it admitted the passage of the ordinance, but denied that it thereby acquired the right to use the streets and alleys. It alleged that by the ordinance it was provided in substance that if the Company failed within thirty days after the approval of the ordinance to signify to the general council its acceptance of the grant in

writing subject to the limitations therein set out, then all the rights and privileges granted should become null and void, and of no effect. It alleged that it did not accept in writing or otherwise the provisions of the ordinance, but it admitted that shortly after the passage of the ordinance it began the erection of its poles and the stringing of its wires in and over the streets and alleys of the City and has since operated its system thereon. Further answering, the defendant alleged that on March 17, 1886, it accepted the Act of Congress approved July 24, 1866, entitled an "act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," and the acts amendatory thereof, and that by the statutes of the United States it thus acquired the right to construct and operate its lines over and along all military and post roads of the United States, and that all public roads and highways and all letter carrier routes established in any city or town for the collection and delivery of mail were by these statutes declared post roads; that all the streets and alleys of the City of Newport are such post roads and that it had erected its poles and strung its wires therein under the acts of Congress and that it voluntarily submitted to such provisions of the ordinance as related to the manner in which its poles should be erected, but not to so much of it as required it to pay one hundred dollars a year; that it paid its taxes as other taxpayers; that other companies are using the streets just as it is using them without being required to pay one hundred dollars a year; that there was no consideration for the alleged contract which made an unreasonable discrimination between the defendant and other telegraph companies, and was in violation of the interstate commerce clause of the United States Constitution and the act of

Congress on the subject of post roads. The court sustained a demurrer to the answer after it had been several times amended, and, the defendant failing to plead further, entered judgment in favor of the plaintiff.

A reversal is sought in this court on the ground that under the denials of the answer the ordinance can not be treated as a contract, but only as a license tax which is void under the United States Constitution as a restriction on interstate commerce, and also void under the State Constitution because unreasonable and not uniform.

The Congress of the United States has no power to take private property for public purposes without compensation, and it can no more take the property of a state or one of its municipalities than the property of an individual. The acts of Congress, referred to in the answer, conferred on the *defendant no right to use* the streets and alleys of the City of Newport, which belonged to the municipality. This was expressly held in *St. Louis* v. *Western Union Tel. Co.*, 148 U. S., 92, and *Postal Tel. Co.* v. *Baltimore*, 156 U. S., 210. The acts of Congress are only permissive so far as the rights of the Federal Government go. The defendant entered on the streets soon after the ordinance was passed and constructed its system. It had no authority to do so, except under the ordinance. Its action was an acceptance of the ordinance in the absence of some express disclaimer which is not alleged. Its failure to accept the ordinance in writing might be waived by the City, and this waiver may be implied from its acquiescence in the defendant's acts. Besides, the ordinance which was made a part of the petition, a copy of it being filed therewith, is not copied in the transcript, and it must be presumed it sustained the judgment rendered on this point.

This is not the case of a license tax imposed on a telegraph company already in the use of the streets and

alleys of the City. The defendant entered the City and got the use of the streets and alleys by virtue of the ordinance and it took its rights subject to the charge which the City made for the grant. The question of the reasonableness of the grant was for the parties to decide. If the defendant was not satisfied with the terms of the grant it could have refused to accept it. It is not material now how many poles the defendant set up; the City took its chance on these things and fixed a lump sum. The defendant in going ahead under the ordinance also took its chance, and it can not be heard to say now that the charge was too high. The poles and wires in the street are a serious servitude and, although the defendant was a foreign corporation and engaged in interstate commerce, it could not impose this servitude upon the City, thus taking its property without compensation. What was a fair compensation for the servitude was a question for the parties to decide. The contract was not without consideration, nor is it to be construed as imposing a license tax and therefore the case does not fall within the line of decisions to the effect that a state can not impose any burden upon interstate commerce within its limits under the guise of a license tax.

This also disposes of the objection that the ordinance is void under the Constitution and laws of the State of Kentucky on the ground that municipal corporations are without power to exact license taxes from some and not from others engaged in the same business. It is not alleged that the City has admitted any other company to use its streets without compensation. The other companies referred to in the answer for all that appears therein may have acquired their rights on other terms and before the adoption of the present Constitution. There is nothing, therefore, to show any discrimination.

No other questions are made, and on the whole case we are of the opinion that the court properly sustained the demurer to the answer.

Judgment affirmed.

OPINION OF THE COURT OF APPEALS OF KENTUCKY IN THIS CASE BY JUDGE CARROLL.

(Decided October 13th, 1914.)

160 Ky., 244; 169 S. W., 700.

In 1895 the council of the city of Newport adopted an ordinance granting the Postal Telegraph Cable Company, and its successors, the right and privilege of erecting poles and stretching wires through the streets and alleys of the city of Newport.

The ordinance contains several sections defining the rights of the city and the company that it is not necessary to here notice, and further provided "Nor shall anything in this ordinance be construed as granting a franchise to the said Postal Telegraph Cable Company."

In section seven it was provided that "The said Postal Telegraph Cable Company shall pay to the city of Newport a special license tax of one-hundred dollars per annum."

In 1899 the city brought suit against the Cable Company to recover the one hundred dollars license tax for the years 1897 and 1898, and from a judgment awarding it this sum, the Cable Company prosecuted an appeal to this court, where the judgment of the lower court was affirmed in an opinion that may be found in 25 Ky. L. R., 635.

In 1897 the Cable Company, which it appears was a New York corporation, sold and conveyed its property in the State of Kentucky, including all rights and interests it had in the city of Newport, to the Commercial Cable Company, another New York corporation. In 1898 the Commercial Cable Company sold and conveyed all of its property, rights and privileges to the Commercial Cable & Telegraph Company, also a New York corporation. In December, 1900, this company sold its property, rights and privileges to the appellant, which is a Kentucky corporation; and since then it has owned, operated and controlled the poles, wires and other property of its predecessors in the city of Newport and occupied the streets and public ways of the city under the ordinance referred to.

In 1908 this suit was brought seeking to recover from the original grantee under the ordinance, the Postal Telegraph Cable Company of New York, the special annual license tax of one hundred dollars for the years 1899 to 1907, inclusive, but by an amended petition the present appellant was made a defendant and the case against the New York corporation dismissed.

In this suit the appellant set up a number of defenses, and after the case had been submitted on the pleadings and exhibits, there was a judgment against it for the license tax due for the years 1903 to 1907, inclusive. As to the other years, the plea of limitation interposed by the Cable Company was sustained and a recovery for the license tax for those years denied.

From the judgment against it for five hundred dollars for the license tax for the years named, the Cable Company appeals, and from the judgment dismissing its petition seeking to recover the license tax for the preceding five years, the city prosecutes a cross appeal.

It is first insisted that the ordinance bestowed no rights on the Telegraph Company and is void. The argument in support of this proposition is that the acceptance by the Postal Telegraph Cable Company, of New York, of the Congressional legislation of 1866 conferred upon it the right granted by the Federal government to erect its poles and string its wires in the city of Newport and elsewhere in the country without asking the consent of any city it might decide to operate in. This Congressional legislation, however, did not take from the city the right to charge a telegraph company for using its streets a reasonable compensation in the way of a license fee or occupation tax. It was expressly so held in City of St. Louis v. Western Union Telegraph Co., 148 U. S., 92, 37 L. Ed., 380. In that case the Western Union resisted the right of the city of St. Louis to charge it five dollars per annum for each pole it erected in the city, upon the ground that its acceptance of the Congressional legislation referred to entitled it to the use of the streets without compensation; but the court said that notwithstanding this legislation the city had authority to charge for the use of its streets and public places. To the same effect is Western Union Tel. Co. v. City of Richmond, 224 U. S., 160, 56 Law Ed., 710. It was also so ruled by this court in the Postal Telegraph Company case, supra.

Another contention is that neither the Constitution nor the laws of the State of Kentucky require that a telegraph company shall obtain the consent of a municipality before constructing its lines in the streets of a city. But we do not find it necessary in this case to go into a discussion of this question. The city granted to the Postal Telegraph Cable Company, of New York, and its successors—one of them being the present appellant, the

right to occupy with its poles and wires the streets and public ways of the city in consideration of the payment to it by the company of one hundred dollars a year.

Under the authority of the ordinance, the validity or effect of which we will not now stop to consider, the grantee in the ordinance, and its successors, have been occupying the streets and public ways, and it will not be heard to say, after it has had the use of the streets and public ways under these circumstances, that the city had no authority to grant it this privilege or to exact from it this tax. The city and the company entered into this agreement. The city has complied with its part of the undertaking, and the company must comply with its part. If the appellant company were now for the first time asserting the right to occupy the streets free from the burden of any license fee or tax for its occupation, we would have before us the question it is sought to raise in this case. But it has been in the possession of the streets since the passage of the ordinance, as we must and do presume, under and by virtue of it, and should pay for its use and occupation the agreed price.

The ordinance expressly states that it is not to be construed as granting a franchise to the company, and doubtless it was well known that a franchise such as is contemplated and required by the Constitution could not be secured in this way. In accepting the use of the streets under this ordinance, the company merely obtained the right, for the stipulated compensation, to occupy the streets until such time as the city might see proper to revoke the license. But so long as the company occupies the streets under the license, it must pay the agreed price.

The compensation provided by the ordinance is not a license tax upon the right of the company to do business in the city but merely a charge against the company for

the use of the streets with its poles and wires. The principles announced in the case of the Cumberland Telephone & Telegraph Co. v. Hopkins, 121 Ky., 850, Adams Express Co. v. Boldrick, 141 Ky., 111, and Cumberland Telephone & Telegraph Co. v. Calhoun, 151 Ky., 241, have not, as we think, any controlling effect on this case.

Nor is there any merit in the assertion that the present appellant is not obligated to pay this so-called license tax, notwithstanding it was settled in the previous decision that its predecessor was liable for it. The ordinance expressly granted the privilege described in it to the Postal Telegraph Cable Company, of New York, and its successors. The present appellant is the successor of that company and is using the streets in the same manner that its predecessor did. Its predecessor was required by this court to pay the compensation and so should the present appellant pay it. This question we regard as settled by the former decision, as likewise is the contention that the exaction of one hundred dollars per annum for the use of the streets is unreasonable.

The claim is further made that the enforcement of this ordinance denies to the appellant the equal protection of the laws, in contravention of section one of the Fourteenth Amendment to the Constitution of the United States. Presenting this defense, it averred in its answer, "one or more other telegraph companies have erected and maintained, and were during the years 1899 to 1908, inclusive, and are now maintaining in the City of Newport a system of telegraph poles and lines, and also one or more telephone companies have used the streets and alleys of the said City for its poles and wires in a manner substantially similar to the system of telegraph poles and lines owned, operated and maintained by the said New York Company and the defendant in said

City, and that none of these companies other than the defendant is subject to the payment of any license tax similar to that attempted to be exacted from the defendant by and under the provisions of the pretended ordinance set out in the petition and for the payment of which this action is brought, and said other telegraph and telephone companies were admitted into the City of Newport and were permitted to erect their poles and lines in the streets and alleys of the city of Newport without being compelled or required and without agreeing, either before, or at the time of said admissions or since, to pay or make any compensation whatsoever to said City by way of rental, license or otherwise."

It would appear from the ordinance that it was adopted by the council pursuant to some arrangement or understanding made between the council and the company but however this may be the authority conferred by the ordinance was a mere license revocable by the city at any time upon reasonable notice and conditions. It did not obligate the City to grant the use of its streets and public ways to the company for any specified period, or oblige the company to pay the stipulated compensation for any longer time than it chose to accept the rights granted by the ordinance.

There is no averment in the answer that any other telegraph company is occupying the streets of Newport under a grant like the one conferred by this ordinance. Other companies may be using, as averred in the answer, "the streets and alleys of the said City with its poles and wires in a manner substantially similar to the system of telegraph poles and lines owned, operated and maintained by the defendant"; but this falls far short of saying that any of these companies are so occupying the streets under an ordinance like the one here

in question. It is also possible, although it does not appear in the record that other telegraph companies occupying the streets, acquired the right to do so before the adoption of the present Constitution. It is also probable that other telegraph companies are occupying the streets under authority of franchises purchased from the City pursuant to the present Constitution.

Cities may, under dissimilar grants, confer dissimilar rights and privileges, and a corporation accepting a privilege under one grant can not complain that other corporations are occupying the streets under different grants that imposed other conditions. The equal protection clause of the Federal Constitution is not violated unless there has been exacted from the complaining party a charge or compensation not imposed on other persons who acquired their rights in substantially the same manner as the complaining party. It is not enough that the complaining party and the other parties are engaged in substantially the same character of business. The business must be pursued under a like grant. In other words, all the conditions and circumstances surrounding the grant, as well as its exercise, must be substantially the same.

Cities have a right to make reasonable classifications of grants, and privileges, and have a right to attach dissimilar conditions and impose dissimilar burdens upon each class. It is only when different burdens are imposed upon persons in the same class, holding under the same or similar grants, that there will be a violation of the equal protection feature of the Federal Constitution. When classification is allowable the discrimination must exist in the class to which the particular grant or privilege applies and be an attempt to impose upon the complaining party in that class burdens that are not im-

posed upon others in that particular class, and we find no such state of case developed in the record. Hayes v. Missouri, 120 U. S., 68, 30 Law Ed., 578; Gulf R. R. v. Ellis, 165 U. S., 148, 41 Law Ed., 666; Southern R. Co. v. Greene, 216 U. S., 400, 54 Law Ed., 536.

Really, so far as the original appeal in this case is concerned, we might have contented ourselves by merely a reference to and an adoption of the opinion in the former case, as we regard every material question in this case as settled by that. But having again briefly outlined the reasons upon which an affirmance of the original appeal may be rested, we wish to make it plain that we put our decision upon the ground that as the cable company accepted whatever rights the ordinance conferred, it must pay the stipulated compensation so long as it chooses to or is permitted to avail itself of the right to occupy the streets under the ordinance.

Coming now to consider the cross-appeal, we think the five year statute of limitation applies. Section 2515 of the Kentucky Statutes reads in part: "An action upon a contract not in writing, signed by the party, express or implied, * * * shall be commenced wiithin five years next after the cause of action accrued."

If this statute is applicable to municipalities, it clearly controls this case, because the liability of the cable company arises upon an implied contract not in writing to pay a stipulated compensation. If this were a contract between individuals or private corporations, there could of course be no doubt about the correctness of this proposition, but it is argued by counsel for the city that a different rule should obtain where a municipal corporation is involved; or, in other words, that the statute of limitation has no applicability to municipal corporations.

We do not, however, find in the statute any suggestion looking toward the exemption of municipal corporations from its operation. In fact there is no mention of municipal corporations in the statute, except in Section 2546, which is confined to actions for the recovery of streets and public ways. It is, however, provided in Section 2523 that "The limitations prescribed in this chapter shall apply to action brought by or in the name of the Commonwealth, in the same manner as to actions by private persons, except where a different time is prescribed by some other chapter in this revision."

A municipality being a mere political sub-division of the State, it would seem to follow by analogy as well as implication that the limitations prescribed should apply to municipalities except where a different time was prescribed. It will be observed that this action on the part of the city is simply for the recovery of money on an implied contract, and we do not find any authority, statutory or otherwise, that would exempt it from the operation of the statute cited: Dillon Municipal Corporations, 4th Edition, Section 675; Metropolitan Railroad Co. v. District of Columbia, 132 U. S., 1, 33 L. Ed., 231.

Wherefore, the judgment is affirmed on the original and cross-appeal.

Supreme Court of the United States

OCTOBER TERM, 1916

No. 676

THE POSTAL TELEGRAPH-CABLE COMPANY,
Plaintiff in Error,

vs.

THE CITY OF NEWPORT, KENTUCKY,
Defendant in Error.

Supplement to Brief for Plaintiff in Error

At the bottom of page thirty-eight of brief for Plaintiff in Error we call attention to two Kentucky cases holding that municipalities have no authority to levy license taxes against telephone, telegraph or express companies. These decisions are based upon the principle that as the general tax laws of Kentucky, particularly Section 4077, Kentucky Statutes, provide for the valuation and taxation of the franchises of telegraph and other companies or in other words, for the taxation of the right to do business in the State and the various municipalities, the privilege having been once taxed, can not be again taxed by

the municipality. Although the tax law was passed November 11, 1892, and was therefore in effect at the time the City of Newport adopted the ordinance in question the decisions of the Court of Appeals cited were not rendered until after that court had decided the former case involving this ordinance. The fact, therefore, that the highest court in the State upheld the levying of this license tax prior to the time that the same court decided that all such license taxes were void, should have required it to hold in the present case that the effect of those decisions reached back and nullified this tax. In other words, as the City of Newport had inserted in the ordinance a provision which was void at its inception, such provision could not be made the basis of a cause of action.

The pleadings allege and the fact is admitted that the Plaintiff in Error has paid its *ad valorem* taxes to the City of Newport, and that in addition it has paid all franchise taxes under the provisions of Section 4077, Kentucky Statutes, which required the State Board of Valuation and Assessment to assess the value of its entire property and franchises and certify a proper apportionment to the different taxing districts, including the cities and towns in which its lines are operated. Pursuant to this provision, the franchise of this company has been valued by the State Board, apportioned to the various cities in which it does business, including the City of Newport, and it has paid to the City of Newport each

year a tax upon that franchise. Having had its franchise assessed as a whole, of which the right or privilege of doing business in the City of Newport is a part, and having paid a tax thereon to the City of Newport, it can not be again taxed on that franchise or privilege under the guise of a "license tax."

In *Cumberland Tel. Co.* v. *Hopkins,* 121 Ky. 850, the City of Eminence, Ky., enacted an ordinance imposing a license fee of $50 on the business of handling telephone messages for pay and $25 upon the business of selling railroad tickets and handling freight. The ordinance was declared invalid as to the plaintiff telephone company and the L. & N. R. R. Co. These companies alleged and proved that they paid *ad valorem* taxes and a tax upon their franchises, and in the course of the opinion, declaring the ordinance invalid, the court said:

> "The franchise tax is 'in addition to the other taxes imposed on it by law' (Sec. 4077, Kentucky Statutes), and is meant to cover all the intangible property of the concern as represented by the earning value of its capital employed in the specific business of a carrier of freight and passengers. The valuation of this corporate franchise by the State Board of Valuation and Assessment is made by Section 4077 the basis for municipal taxation in every municipality in which the corporate franchise may be exercised."
>
> "In the case at bar, it is conceded that appellant railroad company's franchise was so valued and was certified as apportioned to the City of

Eminence and the franchise tax paid thereon for the year in controversy."

* * * * * * * * *

"It is contended that the franchise tax which is collected off of appellant railroad company under the general assessment of its franchise, being a property tax, is quite distinct from the occupation tax which the town under legislative authority has imposed. But it is not. It is the same thing. At least, the franchise tax includes the valuing of the capital stock of the railroad, when and in the event only it exercises the very privileges sought to be taxed again by the ordinance." (P. 859.)

"It was not contemplated by Section 181 of the Constitution quoted that the legislature could authorize a city to tax the same privilege twice for the same year as against the same owner. The railroad being operated in Eminence, is a part of appellant railroad company's system. It no longer has an option whether it will continue to carry freight and passengers to and from that town; it is bound to do so, or forfeit its charter. Never before has it been thought that the State could require its creatures under such severe penalties to do a service, and then put it in the power of a part of the State government to keep them from doing it." (P. 860.)

In *Adams Express Company* v. *Boldrick,* 141 Ky. 111, the Express Company sought to enjoin the police judge of Louisville from collecting a license tax levied on each of the wagons used in its business. The ground upon which it sought to enjoin the col-

lection was that it paid an *ad valorem* tax on its property in the city and a franchise tax, and having paid both these taxes, it could not be required to pay a license tax for the privilege of running its wagons. The court upheld the tax upon the theory that the wagons were not essential to the conduct of the business of the Express Company and the company was in no different position from any other owner of a wagon driven on the streets of the city, but in its opinion made it clear that such a tax could not have been levied against the agent of the company for conducting its business, and upon the same principle a tax could not be levied against a telegraph company for maintaining its lines in the street. The court, at page 113, said:

> "The general council under this statute has authority to impose either a license tax or a franchise tax upon all corporations or persons engaged in business in the city for the privilege of doing business there, but it can not exact for the privilege of doing business both a franchise tax and a license tax at the same time for the same period. It follows from this that, as the appellant company pays an *ad valorem* tax upon its property and a franchise tax for the privilege of doing business in the City of Louisville, that it could not be required to pay a license tax for the privilege of doing business."

and at page 115, said:

> "When a license tax or a franchise tax is imposed upon a corporation or person for the

> privilege of doing a specified thing, then no other tax can be levied upon this identical privilege, nor can this same privilege be taxed again."

In *Cumberland Tel. Co.* v. *Calhoun,* 151 Ky. 241, the City of Calhoun imposed upon each telephone exchange a license fee of $100. The validity of the ordinance was assailed upon the ground that a telephone company which paid both an *ad valorem* and a franchise tax to the City of Calhoun, as it is averred the Telephone Company did, can not be required to pay a business or occupation tax such as the ordinance provided for. It appears that in July, 1894, the Board of Trustees of the Town of Calhoun adopted the following resolution: "On motion it was ordered to let the Cumberland Tel. Co. put up telephone poles on the west side of Fairy St., etc., said poles to be thirty feet above ground, or over." Under the authority so granted, the telephone company proceeded to erect lines and poles and establish a telephone exchange in Calhoun. A franchise tax was imposed by the State Board of Valuation and Assessment, its proportionate share was apportioned to the City of Calhoun, and was paid to the City by the telephone company and the telephone company paid all *ad valorem* taxes assessed against it. The court said:

> "If the appellant had in fact a franchise authorizing it to operate and conduct a tele-

> phone exchange in the City of Calhoun, and to occupy streets, and it also paid an *ad valorem* or property tax, it was not within the power of the Council to charge it, as the ordinance does, with an occupation tax, or a tax for the privilege of conducting its business in the City."

We also point out on page thirty of our brief, that the state did not delegate to the City the right to either grant or withhold permission to occupy the streets for telegraph purposes. It, therefore, had no specific charter right either to withhold permission or levy the "license tax." Neither did it have any implied authority. *District of Clifton* v. *Cummins*, 165 Ky. 526.

Therefore, even if the Constitution and Statutes of Kentucky to which we have referred had not been in force at the time the ordinance was adopted, but had taken effect at a later date, the holding of the Kentucky courts that the provision was contractual and therefore enforceable was not justified, for, as said by this court in *Puget Sound Traction Co.* v. *Reynolds*, 244 U. S. 574, 579, "contractual provisions in franchises conferred by municipal corporations without express legislative authority are subject to be set aside by the exercise of the sovereign power of the state."

The foregoing proposition is sound. It therefore follows that when, as in the instant case, the sovereign had exercised its power at the time of the

passage of the ordinance, but the courts did not interpret the exercise so as to give it full effect until a later date, the sovereign will of the state must control and result in setting aside the ordinance.

Respectfully submitted,

MORISON R. WAITE,

JOHN RANDOLPH SCHINDEL,

Counsel for Plaintiff in Error.

Supreme Court of the United States.

October Term, 1916.

No. [redacted] 273

THE POSTAL TELEGRAPH-CABLE COMPANY,
Appellant,
vs.
THE CITY OF NEWPORT, KENTUCKY.
Appellee.

In Error to the Court of Appeals of the State of Kentucky.

NOTICE TO APPEAR, AND ASSIGNMENT OF ERRORS.

INDEX.

List of Authorities Cited.

Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 676.

THE POSTAL TELEGRAPH - CABLE COMPANY, *Plaintiff in Error,*
vs.
THE CITY OF NEWPORT, KENTUCKY, *Defendant in Error.*

In Error to the Court of Appeals of the State of Kentucky.

MOTION TO DISMISS, OR AFFIRM, OR TRANSFER TO SUMMARY DOCKET, AND BRIEF, AND ARGUMENT IN SUPPORT OF SAID MOTIONS.

Now comes the defendant in error, The City of Newport, Kentucky, by Brent Spence, its Attorney, and respectfully moves this honorable Court:

1. To dismiss the writ of error herein, on the ground that this Court has no jurisdiction thereof; because there is no color of ground for the averment; that the judgment of the Court of Appeals of Kentucky infringes upon the Federal Constitution, or the Act to regulate Commerce, or places a direct burden or restriction on Inter-state Commerce, or infringes upon the Act making all public roads and highways post roads.

2. To affirm the judgment of the Court of Appeals of Kentucky, because it is manifest the writ was taken for delay only and that the question on which the decision of the case herein depends is so devoid of merit as not to need further argument, having been plainly and repeatedly decided by this Court contrary to the position taken in the assignment of errors filed herein by plaintiff in error.

3. If this honorable Court, upon consideration hereof, refuses to grant either of the foregoing motions, then that the case be transferred for hearing to the Summary docket because the case is of such character as not to justify extended argument.

BRENT SPENCE,
Attorney for Defendant in Error.

STATEMENT OF THE CASE.

In 1895 the Council of the City of Newport, Kentucky, adopted an ordinance granting to The Postal Telegraph-Cable Company and its successors the right and privilege of erecting poles and stretching wires through the streets and alleys of the City of Newport. The ordinance contained several sections defining the rights of the City and the Company, and provided, amongst other things, "nor shall anything in this ordinance be construed as granting a franchise to the said Postal Telegraph-Cable Company." In Section 7, it was provided that: "the said Postal Telegraph-Cable Company shall pay to the City of Newport a special license tax of $100.00 per annum."

In 1899 the City brought suit against the Cable Company to recover the $100.00 license tax for the years 1897 and 1898 and from a judgment awarding it this sum the Cable Company prosecuted an appeal to the Court of Appeals of the State of Kentucky, where the judgment of the lower court was affirmed in an opinion that may be found in 76 S. W. 159, 25 Ky. Law Rep. 635. This judgment is in full force and effect and has never been modified, reversed or set aside.

In 1897 the Cable Company, which it appears was a New York corporation, sold and conveyed its property in the State of Kentucky, including all rights and interests it had in the City of Newport, to The Commercial Cable Company, another New York corporation.

In 1898 The Commercial Cable Company sold and conveyed all of its property, rights and privileges to the Commercial Cable and Telegraph Company, also a New York corporation.

In December, 1900, this company sold its property, rights and privileges to the plaintiff in error, which is a Kentucky corporation, and since then it has owned, operated and controlled the poles and wires and other property of its predecessors in the City of Newport, and occupied the streets and public ways of the City, under the ordinance referred to.

In 1908 this suit was brought seeking to recover from the original grantee, under the ordinance, The Postal Telegraph Cable Company, of New York, the special annual license tax of $100.00 for the years 1899 to 1907 inclusive, but by an amended petition the plaintiff in error was made a defendant and the case against the New York corporation was dismissed. In the suit plaintiff in error set up a number of defenses, and after the case had been submitted on the pleadings and exhibits, there was a judgment against it for the license tax due for the years 1903 to 1907 inclusive. As to the other years, plea of limitation interposed by the Cable Company, was sustained, and recovery for those years denied.

From judgment against it for the $500.00 for the license tax for the years named, the Cable Company appealed and the Court of Appeals of Kentucky affirmed the judgment of the lower court. That judgment is now here for review on writ of error.

QUESTIONS PRESENTED BY THE RECORD FOR DECISION.

The only questions that are presented by the record in this case that have any pretended color for ground of averment that they are federal questions are as follows:

FIRST: Did the Act of July 24, 1866 C. 230, 14 Stat. at L. 221, granting to telegraph companies the right to erect poles and string wires on post roads, deprive the city of the right to charge a company exercising such right a reasonable fee or occupation tax for such use?

SECOND: Was plaintiff in error, a domestic corporation, denied the equal protection of the laws as guaranteed by the 14th amendment to the Federal Constitution, because other companies may have been authorized to use the streets of the city on less onerous terms, it not appearing that these companies were operating under similar grants to plaintiff in error.

THIRD: Did the plaintiff in error acquire its rights herein subject to the previous adjudication and chargeable with notice of the judgment in the case of Postal Telegraph Cable Company v. The City of Newport, the opinion in which case may be found in 76 S. W. 159, 25 Ky. Law Rep. 635, in which case the appellant was the predecessor in interest and in privity with and grantor of all the rights and privileges of the plaintiff in error herein, every question having been raised in that case that has been raised in this case and decided adversely to plaintiff's in error predecessor and the judgment in that case never having been modified, reversed or set aside.

POINTS AND AUTHORITIES.

FIRST: There is no color of ground for the contention that the Act of July 24, 1866 C. 230, 14 Stat. at L. 221, granting to telegraph companies the right to erect poles and string wires on post roads deprives the city of the right to charge a company exercising such right a reasonable license tax or rental for such use.

Postal Telegraph-Cable Co. v. *City of Newport,* 76 S. W. 159, 25 Ky. Law Rep. 635 (Opinion former appeal of this case.)

Postal Telegraph-Cable Company v. *City of Newport,* 160 Ky. 244, 169 S. W. 700 (Opinion of the Court of Appeals of Ky. in this case.)

St. Louis v. *Western Union Telegraph Company,* 148 U. S. 92.

Postal Telegraph-Cable Company v. *Baltimore,* 156 U. S. 210.

City of Richmond v. *Southern Bell Telephone Co.,* 174 U. S. 758.

Western Union Telegraph Company v. *City of Richmond,* 224 U. S. 160.

SECOND: There is no color of ground for the contention that plaintiff in error, a domestic corporation, was denied the equal protection of the laws as guaranteed by the 14th amendment to the Federal Constitution because other companies may have been authorized to use the streets of the city on less onerous terms, it not appearing that other companies were operating under similar grants to plaintiff in error.

Postal Telegraph Cable Company v. *City of Newport,* 76 S. W. 159, 25 Ky. Law Rep. 635. (Opinion former appeal of this case.)

Postal Telegraph Cable Company v. *City of Newport,* 160 Ky. 244, 169 S. W. 700. (The opinion of the Court of Appeals of Ky. in this case.)

Bowman v. *Lewis,* 101 U. S. 22.

Hayes v. *Missouri,* 120 U. S. 68.

Walston v. *Nevin,* 128 U. S. 578.

Gulf C. & S. F. R. R. Co. v. *Ellis,* 165 U. S. 150.

Southern R. R Co. v. *Greene,* 216 U. S. 400.

Lake Shore & Michigan S. R. Co. v. *Clough,* U. S. Adv. Ops. 1916, P. 148.

THIRD: There is no color of ground for the contention that the plaintiff in error did not acquire its rights herein subject to the previous adjudication and chargeable with notice of the judgment in the case of Postal Telegraph Cable Company v. The City of Newport, the opinion in which case may be found in 76 S. W. 159, 25 Ky. Law Rep. 635, in which case the appellant was the predecessor in interest and in privity with and the grantor of all the rights and privileges of the plaintiff in error herein, every question having been raised in that case that has been raised in this case and decided adversely to plaintiff's in error predecessor and the judgment in that case never having been modified, reversed or set aside.

Tioga R. Co. v. *Blossburg & C. R. Co.,* 20 Wall 137.

Minneapolis Agricultural and Mechanical Association et al v. *Canfield,* 121 U. S. 295.

Scotland County v. *Hill,* 132 U. S. 107.

Respectfully submitted,

BRENT SPENCE,

Attorney for Defendant in Error.

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 676.

THE POSTAL TELEGRAPH-CABLE COMPANY,
Plaintiff in Error,

vs.

THE CITY OF NEWPORT, KENTUCKY,
Defendant in Error.

Brief for Plaintiff in Error

On Motion to Dismiss or Affirm or to Transfer to Summary Docket

---

MORISON R. WAITE,
JOHN RANDOLPH SCHINDEL,
Counsel for Plaintiff in Error.

INDEX

AUTHORITIES

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STATEMENT

On the 5th day of December, 1895, the City of Newport passed an ordinance entitled "An Ordinance Granting to The Postal Telegraph-Cable Company the Right and Privilege of Erecting Poles and Stretching Wires Through the Streets and Alleys of the City of Newport." (Rec. 18-19.) Section one was as follows:

"That the right and privilege of erecting poles and stretching wires in and over the streets and alleys of the City of Newport, Ky., necessary to the establishment, operation and maintenance of a telegraph system connecting said city with other towns and cities, is hereby granted to The Postal Telegraph-Cable Company and its successors subject to the limitations and restrictions hereinafter set out and provided."

By section two the Company was required to furnish the mayor and superintendent of public works with a statement in writing of the streets, etc., through which they desired to erect their poles, and said section further provided that no streets should be used until the mayor and the superintendent of public works had consented; that the location of the poles, the height of same, and all reasonable regulations should be subject to the approval of the superintendent of public works; that after the system had been located, no additional streets should be occupied without the permission of council, the mayor and the superintendent of public works, and that the Company should not change the location of poles or erect additional poles without the consent and under the supervision of the superintendent of public works.

Section four provided that the Company should not charge more for receiving or sending messages than the Western Union did for similar services.

Section five provided that:

"Should the said Postal Telegraph-Cable Company fail, within thirty (30) days after the approval of this ordinance, to signify to the General Council of the City of Newport their acceptance of the rights and privileges granted by this ordinance, subject to the limitations herein set out, then all of the rights and privileges herein granted shall become null and void and of no effect.

"Said Company shall accept the same in writing. Said acceptance shall be entered upon the journal of both Boards of said General Council and copied upon the ordinance book of the City of Newport, immediately following said ordinance when recorded."

Section six provided that *nothing should be construed as a forfeiture or waiver of any right of the City of Newport* to require the Company to place

its wires under ground or *to make proper or necessary regulations of poles and wires* nor should the ordinance be construed "as granting a franchise to said Postal Telegraph-Cable Company."

Section seven provided:

"Said Postal Telegraph-Cable Company shall pay to the City of Newport a *special license tax* of $100 per annum."

The Postal Telegraph-Cable Company referred to was a corporation under the laws of the State of New York and did not accept said ordinance as provided in section five, or at all, and did not furnish the mayor and superintendent of public works with a list of streets as provided in section two and no acceptance was entered on the journals of the boards of council or recorded in the ordinance book. (Answer, Rec. 13.)

It did, however, assuming to act under the authority of the Post Roads Act, construct its lines and string its wires, and because it acted under and was on the streets by the authority of the United States and not under the ordinance, it refused to pay the "license tax." (Rec. 14-15.)

On or about the 9th day of September, 1899, the City of Newport brought suit in the Campbell Circuit Court to recover the $100 "license tax" for the years 1897 and 1898. (See second amended petition, Rec. 20.) A judgment was entered for the sum of $200 and said judgment was affirmed by the Court of Appeals of Kentucky. (*Postal Telegraph-Cable Co. v. City of Newport*, 25 Ky. Rep. 635.)

On the 1st day of January, 1897, The Postal Telegraph-Cable Company of New York, which had constructed said lines in the City of Newport, sold, transferred and conveyed its property, rights and

lines of telegraph in the State of Kentucky and elsewhere, including its rights over the roads and streets and alleys in the State of Kentucky, and in the various cities and municipalities thereof to The Commercial Cable Company, a corporation under the laws of the State of New York, and the grantee on the same day, mortgaged all of said property, lines and franchises to The Farmers Loan & Trust Company, as trustee, to secure an issue of 2,000,000 four per cent. gold bonds and debenture stock. Said Commercial Cable Company operated said lines in the City of Newport in the name of The Postal Telegraph-Cable Company of New York until on or about the 30th day of June, 1898, when said Company sold, transferred and conveyed all of said property, liens, franchises, etc., subject to said mortgage, to The Commercial Cable & Telegraph Company, a corporation under the laws of New York. Said property so transferred included the rights which the New York Company had originally had in the roads and streets and alleys in the municipalities and cities in the State of Kentucky, wherein and whereover it had a line or lines of telegraph system in that state. From said 30th day of June, 1898, to the 31st day of December, 1900, said Commercial Cable & Telegraph Company owned and operated said lines in the name of The Postal Telegraph-Cable Company of New York, and on said 31st day of December, 1900, for a valuable consideration, sold, transferred, and conveyed all its rights, including its rights over the roads and streets and alleys of the various cities and municipalities in the State of Kentucky to plaintiff in error, which ever since said date has owned and operated said lines and still owns and operates the same. It is entirely separate and distinct from The Postal Telegraph-

Cable Company of New York, and has no contract relations or business transactions whatsoever with said New York Company. Said Postal Telegraph-Cable Company of New York retired entirely from active business except certain business in the State of New York and said corporation, in fact, no longer bears the same name as the Kentucky corporation, but by order of the Supreme Court of New York its name has been changed to The Transcontinental Telegraph Company. (Rec. 24-26.)

On the 26th day of May, 1908, this suit was filed in the Circuit Court of Campbell County, Kentucky, to recover from The Postal Telegraph-Cable Company of New York the $100 "special license tax" for the years 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907 and 1908. Motions were filed to set aside service upon the New York Company, and thereafter on the 21st day of November, 1908, the City of Newport filed an amended petition making plaintiff in error party defendant, and the case was dropped against the New York Company. (Rec. 7.) Plaintiff in error filed its answer (Rec. 10-17), denying that either it or the New York Company acquired by virtue of said ordinance the right or privilege of erecting its poles or stretching its wires in the City of Newport or maintaining the same and alleging that at the time of the passage of the ordinance it was not in existence, and denying that in consideration of said grant, said New York Company or this appellant had agreed or promised to pay said sum of $100, or that either one agreed to pay it at all. It admitted that shortly after the passage of said ordinance the New York Company commenced the construction of its system in the City of Newport, but denied that it had done so or had strung any wires or erected any poles by virtue of said ordi-

nance, and *denied that the New York Company had accepted said ordinance or entered into any contract with the City of Newport.* It also pleaded the statute of limitations with respect to the amounts claimed for the years, 1899, 1900, 1901, 1902, 1903 and in the fifth paragraph of said answer (Rec. 14), it set forth that at the time of the passage of said ordinance the New York Company was engaged in the business of maintaining and operating a system of telegraphy in the State of Kentucky and between the cities and towns in said state and various other cities and towns in other states, and had, on or about the 17th day of March, 1886, accepted the Act of Congress approved July 24, 1866, and the acts amendatory thereof; that ever since the passage of the Act of March 1, 1884, all of the public highways and roads and the streets and alleys of the City of Newport were Post Roads, and that said Company, by virtue of the provisions of the law of the United States, was entitled to erect its poles and string its wires in the City of Newport, and under said authority had done so. Defendant also pleaded that it had during all of the years set forth in the petition paid its *ad valorem* property taxes to the City of Newport and the State of Kentucky, and that it had paid the City of Newport taxes upon its tangible and intangible property, including its franchise.

Said answer also set forth (Rec. 16) that one or more other telegraph companies and telephone companies had erected and maintained and were during these years maintaining systems of telegraph or telephone in the City of Newport and poles and wires in a manner substantially similar to the system of this defendant and that none of these companies other than the defendant was subject to the payment of any "license tax" similar to that attempted to be

exacted from the defendant. Said other telegraph companies were admitted into the City of Newport and were permitted to erect their poles and lines without being compelled or required, and without agreeing either before or at the time of said admission or since to pay or make any compensation whatsoever to said city by way of payments, license or otherwise, and that said ordinance violated the Constitution of the State of Kentucky and the Constitution of the United States, particularly section one of the Fourteenth Amendment and section eight of Article one, commonly known as the Interstate Commerce clause.

The city demurred to each paragraph of the defendant's answer. On July 15, 1909, the court overruled the demurrer as to paragraphs three and six, being the paragraphs setting up the statute of limitations and pleading the failure of the city to comply with the Constitution and laws of Kentucky as to granting franchises and sustained said demurrer as to paragraphs one, two, four and five. The defendant excepted and filed an amendment to its answer setting forth the facts as to the transfer of the property hereinbefore set forth. In November, 1910, the City of Newport filed a second amended petition setting forth verbatim the petition and judgment in the former case. (Rec. 20.) To this the defendant demurred. The demurrer was overruled, the court holding that the pleading should be treated as a reply and plea in bar, and the defendant excepted and thereafter filed an answer or rejoinder. (Rec. 26.) In the first paragraph of said rejoinder defendant set forth the transfer of the property from the New York Company to the intermediate grantees and finally to it and the other facts hereinbefore stated with respect to said Company, and by a second

paragraph alleged that it on or about the 3d day of December, 1900, accepted the Post Roads Act of Congress and had complied with all the terms thereof, and that pursuant to its rights under said acts it was operating and maintaining its telegraph system in the City of Newport in such a manner as not to obstruct or interfere with the ordinary travel on said city streets *and was not operating or maintaining any part of said system pursuant to any acceptance of the ordinance in question.* (Rec. 27.)

The cause was thereafter submitted for judgment on the pleadings and a judgment entered for $500 covering the years 1903, 1904, 1905, 1906 and 1907, and the petition was dismissed as to the claims for prior years. (Rec. 29.)

All of the foregoing facts appear in the pleadings, and on the motion for judgment on the pleadings are admitted to be true.

ASSIGNMENTS OF ERROR

The questions presented to this court by the assignments of error are the following:

(1) Did the ordinance of the City of Newport impose any obligation on the plaintiff in error or bestow any right on either the plaintiff in error or the New York Company which they did not already have? (Assignments fourth and fifth, Rec. 39-40.)

(2) Did the effect given to the ordinance by the Kentucky courts deny the right of the plaintiff in error to erect, maintain and operate its lines over the streets of the City of Newport pursuant to the Act of Congress of July 24, 1866, and amendments thereto, and was the "license tax" a burden on or interference with interstate commerce? (Assignments first and second, Rec. 39.)

(3) Did the effect given to the ordinance by the Kentucky courts deny to the plaintiff in error the equal protection of the laws? (Assignment third, Rec. 39.)

(4) Was the judgment in the former case against the New York Company binding on the plaintiff in error? (Assignment sixth, Rec. 40.)

ARGUMENT

I

The Ordinance bestowed no right upon the Plaintiff in Error or upon its predecessor, the New York Company, and imposed no legal obligation

The New York Company prior to the passage of this ordinance had accepted the provisions of the Post Roads Act of July 24, 1866, and by virtue thereof acquired the right to construct its telegraph lines over any post road in the United States, which, since the amendment of March 1, 1884, includes every street and alley in the various municipalities throughout the country. The right to string its wires and erect its poles on such streets and alleys being granted by the Federal Government, can not be denied by any municipality, for the Company in doing so, is acting by the paramount authority of the Federal Congress, and comes as a governmental agency in performing an important function in interstate commerce. In the language of one court: "It neither asks nor can the city demand any permit or license to be or remain on such public highways. It has the right to demand the use of plaintiff's streets and alleys and the plaintiff must submit to such use with or without an ordinance." *St. Louis v. Western Union Telegraph Co.*, 63 Fed. 68, 73; affirmed, 166 U. S. 388.

The rule was well stated by the Supreme Court of Washington in the case of *Western Union Tel. Co.* v. *Lakin*, 53 Wash. 326, 101 Pac. Rep. 1094, when it said:

"The company received under its Federal franchise the right to do business upon all the roads and highways in the County of Pierce, whether within or without incorporated cities and towns. This right could not be denied. The power of the city was limited to its right to regulate the use of the privilege granted by Congress. It might provide that poles and wires should be carried over certain streets; that wires should be carried on poles or buried in the ground; that travel should not be unreasonably obstructed, and that poles should be of a certain height, and other like instances. Beyond this, it had no power to go. The ordinance relied upon did not grant a franchise." (P. 1098.)

The act is now included in what is section 5263, Revised Statutes of the United States, and is as follows:

"Any telegraph company now organized, or which may hereafter be organized, under the laws of any state, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

By the Act of June 8, 1872, all letter carrier routes established in any city or town were declared to be post roads and by the Act of March 1, 1884,

United States Compiled Statutes, page 2708, all public roads and highways, while kept up and maintained as such, were declared to be such post roads. Under this act, all of the streets and alleys of the City of Newport are post roads and the New York Company which had accepted the Post Roads Act was entitled to construct, maintain and operate its lines over and along them, complying with reasonable regulations to prevent the obstruction of ordinary travel and to protect people traveling on such highways from injury.

Chief Justice Waite in *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 8, said that the Post Roads Act of Congress

"substantially declares in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens that the erection of telegraph lines shall, so far as interference is concerned, be free to all who will submit to the conditions imposed by Congress."

Western Union Tel. Co. v. *Mass.*, 125 U. S. 530:

"No state can exclude a telegraph company, which has accepted the terms proposed by the national government for this national privilege from prosecuting its business within the state."

Probably the most recent decision is *Essex* v. *New England Telegraph Co.*, 239 U. S. 313, in which this court, at p. 320 said:

"Many opinions of this court establish beyond question the validity and point out the general purposes of the Act of 1866. 'It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the Government of the United States and its citizens,

that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed.' *Pensacola Telegraph Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 11. A state has no authority to say that a telegraph company may not operate lines constructed over postal routes within its borders. *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, 554. A city may not arbitrarily exclude the wires and poles of a telegraph company from its streets, but may impose reasonable restrictions and regulations. *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92, 105; *Western Union Tel. Co.* v. *Richmond*, 224 U. S. 160, 170. See also, *Western Union Tel. Co.* v. *Pennsylvania R. R.*, 195 U. S. 540; *United States* v. *Union Pacific Ry.*, 160 U. S. 1, 44; *Postal Tel. Co.* v. *Chicopee*, 207 Massachusetts, 341, 343."

and at pages 321-322:

"The streets and highways of Essex are undoubtedly post roads within the meaning of the Act of 1866. *Western Union Tel. Co.* v. *Richmond, supra;* Act of March 1, 1884, c. 9, 23 Stat. 3. What rights —if any—in respect of them were immediately secured by the telegraph company through acceptance of that act, we need not consider. It entered upon those now occupied notoriously, peacefully and without objection, and has developed there a necessary means of communication. The statute must be construed and applied in recognition of existing conditions and with a view to effectuate the purposes for which it was enacted. Among the latter, as stated in *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, and *Western Union Tel. Co.* v. *Massachusetts, supra,* are the extension and protection of instrumentalities essential to the commercial intercourse and the efficient conduct of governmental affairs."

The foregoing authorities, and there are none to the contrary, make it clear that the Postal Telegraph-Cable Company of New York, the company which constructed the lines, and which the city

claims was the beneficiary of the ordinance, was on the streets of the City of Newport, not by virtue of the ordinance, but by virtue of the paramount authority of the United States Government, and that there was nothing bestowed upon it by the ordinance in question.

Not only was the New York Company on the streets by authority of the United States Government, but it was also there by authority of the State of Kentucky. Section 199 of the Constitution of Kentucky provides that:

"Any association or corporation * * * shall have the right to construct and maintain lines of telegraph within this state and to connect the same with other lines, and said companies shall receive and transmit each other's messages. * * * The General Assembly shall by general laws of uniform operation provide reasonable regulations to give full effect to this section. *Nothing herein shall be construed to interfere with the rights of cities or towns to arrange and control their streets and alleys and to designate the places at which and the manner in which the wires of such companies shall be erected or laid within the lines of such city or town.*"

It will be noted that this section is similar to the Massachusetts law referred to in 239 U. S., page 317, in the opinion in the Essex case, and confers upon telegraph companies the right to construct and maintain lines of telegraph within the state, and recognizes and expressly reserves to the cities and towns the right to control their streets and to designate the places at which and the manner in which the wires of such companies shall be erected or laid within the lines of such cities and towns.

Notwithstanding these rights, the City of Newport passed the ordinance of December 18, 1895, but expressly provided that unless it was accepted in

writing and that writing entered upon the journals of both Boards of the General Council and copied upon the ordinance book following the ordinance, it should be null and void and of no effect. (Rec. 19.) As heretofore pointed out, no acceptance of any kind was made by the Company and the ordinance therefore by its own terms ceased to exist at the end of thirty days. Not only did the New York Company not accept the ordinance in terms, but it did not, as provided by section two of the ordinance, advise the mayor and superintendent of public works over what streets it intended to locate its lines but proceeded to erect its poles and string its wires. Said lines were constructed without objection and operated for several years before the first suit hereinbefore referred to was instituted, and it is perfectly apparent that the use of the streets was referable to the Post Roads Act and not to the ordinance.

The Court of Appeals in its opinion (Rec. 34) said:

"The City and Company entered into this agreement. The City has complied with its part of the undertaking and the Company must comply with its part. If the Company were now for the first time asserting the right to occupy the streets free from the burden of any license fee or tax for its occupation, we would have before us the question it has sought to raise in this case, but it has been in possession of the streets since the passage of the ordinance, *as we must and do presume under and by virtue of it*, and should pay for its use and occupation the agreed price."

From the foregoing quotation it will be seen that notwithstanding the fact that the Company did not comply with the terms of the ordinance, by accepting within thirty days, and did not accept at all, the court nevertheless assumes that a contract had been

entered into. This does violence, not only to the terms of the ordinance itself, but to every principle of law and justice. The Company pleads that it did not accept the ordinance, but did act under the authority granted by the Post Roads Act, and the City on the motion for judgment on the pleadings, admits these facts. Yet, the Kentucky courts say in effect that the building of the lines, though clearly referable to the Company's rights under the Post Roads Act, constituted an acceptance and resulted in the making of a contract contrary to the intention of the Telegraph Company; in other words, they have compelled the Telegraph Company, if their judgment stands, to make a contract which it had no intention of making. Such an unjust result this court will not permit to stand, irrespective of the fact that it in itself does not involve a Federal question.

In *Terre Haute & Indianapolis R. R. Co.* v. *Indiana*, 194 U. S. 579, this court, speaking through Mr. Justice Holmes, laid down the rule that it would not decline jurisdiction of a case in which

"A state court has sustained a result which can not be reached except on what this court deems a wrong construction of the charter, without relying on unconstitutional legislation."

In *Bradley* v. *Lightcap*, 195 U. S. 1, 22, Mr. Chief Justice Fuller stated the rule as follows:

"We can not decline jurisdiction because of a construction that we deem untenable."

In *Schlemmer* v. *Buffalo, Rochester & Pittsburgh Ry. Co.*, 205 U. S. 1, 11, Mr. Justice Holmes, at page 11, again thus stated the law:

"If it is evident that a ruling purporting to deal only with local law has for its premises or necessary

concomitant a cognizable mistake, that may be sufficient to warrant a review."

It is only by relying upon the unfair and violent principle laid down by the Kentucky courts that it is possible to avoid the plain conclusion that the occupancy of the New York Company and now that of the plaintiff in error is referable, not to the ordinance, but to the Post Roads Act. The City is not attempting to enforce regulations authorized by the Constitution of Kentucky "designating the places at which and the manner in which" the poles shall be placed or the wires strung or otherwise regulating the use of the streets. It reserved the right to do this in section six, but the right has not been exercised. Neither is it attempting to enforce a rental ordinance. The ordinance itself defines the assessment as a "license tax," and the answer of the Company (Rec. 15) alleges expressly that the $100 payment was not imposed as rental, but as a "special license tax." It therefore follows as a logical conclusion that the judgment from which this proceeding was taken is an infringement upon the plaintiff in error's rights under the Constitution and laws of the United States.

The Plaintiff in Error is not bound by any promise made by the New York Company

There was no right or privilege which the City had the power to bestow which the New York Company did not already have, and there was, therefore, no consideration for the contract alleged in the petition, but even if there had been a contract binding upon the New York Company, such a contract is not binding upon The Postal Telegraph-Cable Company of Kentucky. It has accepted the provisions of the Post Roads Act, and both by that act

and by the provisions of section 199 of the Constitution of Kentucky, hereinbefore set forth, has a right to be upon the streets of the City of Newport, irrespective of any ordinance. It has not asked the City of Newport for any favor, and is in that city on its streets by virtue of the superior authority of the state and nation. Every argument made to show the invalidity of the ordinance, in so far as the New York Company was concerned, applies with greater force to the position of this Company.

Construing the opinion (appendix) in the former case most favorably for the City, there was at most an implied promise on the part of the New York Company to make the annual payment. That promise was the personal covenant of that Company, and is not binding upon plaintiff in error. The pleadings show that the New York Company conveyed its rights in 1897 to The Commercial Cable Company, which company in turn mortgaged its entire property to The Farmers Loan & Trust Company and later conveyed, subject to the mortgage, to The Commercial Telegraph & Cable Company, which in its turn, on December 31, 1900, conveyed its Kentucky property and rights to the appellant in this case.

We are therefore presented with the question whether if A, who has made a promise to pay B a sum of money annually, the consideration for that promise having been the grant to A of the right to cross B's farm, transfers said right to C, whether C is bound by A's promise to continue the annual payment to B. Neither the annual payment suggested in the illustration nor the annual payment provided for in this ordinance are conditions of the grant. The transfer of the right, which was the consideration for the payment, the right to cross the farm in the illustration given or the right to maintain the telegraph poles as alleged in the petition

does not carry with it the obligation to make the payment unless it is expressly assumed. It is not a covenant which runs with the thing granted any more than it would run with the land, if the consideration was a grant of land instead of a mere right of way. It is a well-recognized principle that no covenant which is a burden will run with the land, but only those which are a benefit.

This payment was in no sense a lien on the poles, wires or easement in the streets, and even if it had been, this appellant would not be liable unless it *expressly* assumed its payment.

2 Jones on Mortgages (6 ed.), Sec. 748, in which the author says:

"To create such liability there must be language which clearly imports that the grantee assumes the obligation of paying the debt."

The same rule is laid down in *Clay Fire Ins. Co.* v. *Hickman*, 6 Ky. Rep. 308; *Fisher* v. *Hall's Ex'r*, 63 S. W. 287, 23 Ky. Rep. 405.

We have never heard it asserted, and we are quite sure the counsel for the City can point to no case in which it has been determined that a transfer of property carries with it an obligation to make a payment which is not a condition of the grant or attached to it except as a consideration and which the grantee or transferee does not expressly assume. If the annual payment is not a condition of the grant, but a covenant which has not been expressly assumed by the grantee, the ordinance could only be enforced against this defendant upon the theory that it provides a valid license tax for the privilege of carrying on business in the City of Newport. As such a tax it would be void.

The court must bear in mind that in the ordinance no limitation or condition was put upon the absolute

and unqualified right of the New York Company. Reliance was placed exclusively upon the personal promise, if any was made, to pay the annual license fee. The ordinance did not provide that if the payment was not made the grant should not take effect, nor did it provide for a forfeiture in the event of non-payment. In any possible aspect and especially in any aspect favorable to the City there was, at the very most, a bare personal promise which did not attach to the right granted. As was said by the court in *Hepburn* v. *Snyder,* 3 Pa. St. 72, which involved the promise of a grantee to assume a certain indebtedness, "the estate is conveyed clear of everything but a personal covenant of the grantee." Such was the character of the grant in this ordinance. It was free and clear of everything but what the Court of Appeals has held to be a personal promise. When the rights in the streets of Newport were conveyed by the New York Company to this appellant, if those rights were to any extent obtained from the City of Newport, the transfer did not carry with it this personal covenant or promise, but continued clear of everything.

This Company stands on its own feet. It did not assume any promise of the New York Company, expressed or implied, and by the express provisions of Sec. 5265, R. S., U. S., it could not acquire by any transfer the rights of that Company under the Post Roads Act. It was obliged to and did accept the provisions of that Act.

The adjudication in the former case is not conclusive in this

Under the ruling laid down in the cases hereinafter cited, it would not be conclusive, even as to the New

York Company, but even if it was conclusive as to that Company, this Company is not bound by it for the very obvious reason that for a judgment in one action to constitute a bar to another action or defense thereof, there are at least three requisites:

1. The subject-matter must be the same.
2. The cause of action must be the same.
3. The parties must be the same, or they must be in privity with the former parties.

That the subject-matter or causes of action here are not the same as those in the previous action is manifest. That was an action to recover upon two causes of action arising in the years 1897 and 1898 respectively. This is an action to recover on several causes of action arising in the years 1899 to 1908, inclusive. It is therefore apparent that the causes of action are different. The subject-matters of the two actions are different and the parties are different, but admitting, for the purpose of argument, that this Company is in privity with the New York Company, the court must determine to what extent under these pleadings this defendant is bound by the judgment in the former action. It is frequently stated that the parties to an action and their privies are estopped not only by what was determined in a former action, but also by what might have been determined. This rule, however, applies only when an attempt is made to enforce in a second action the same cause of action or the same defense which was in issue and adjudicated in the former action. The rule does not apply where the parties to the first action are litigating a different demand or cause of action.

In *Davis* v. *Brown*, 94 U. S. 423, the Supreme Court of the United States, speaking through Mr. Justice Field, in referring to an argument in support

of a position analogous to that taken by the plaintiff in this case, said:

"In taking this position, counsel have confounded the operation of a judgment upon the demand involved in the action in which the judgment was rendered, with its operation as an estoppel in another action between the parties upon a different demand. So far as the demand involved in the action is concerned, the judgment has closed all controversy; its validity is no longer open to contestation, whatever might have been said or proved at the trial for or against it. The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it; and that is all that the language means which is quoted by counsel from opinions in adjudged cases, in seeming consonance with his position.

"When a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence. We have already had occasion, in the case of *Cromwell* v. *County of Sac, supra,* p. 351, to go over this ground and point out the distinction mentioned; and it is unnecessary to repeat what we there said." (P. 428.)

In *Cromwell* v. *County of Sac,* 94 U. S. 351, Mr. Justice Field discussed this question at length. At page 352 he said:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or

cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. * * * The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, can not again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Thus, if the judgment in the former case had not been paid and the City was now seeking to collect that judgment from this defendant, the second amended petition, which is in legal effect a reply, would be good, but in the present action in which the plaintiff is seeking to recover upon different demands, different causes of action from that asserted in the former case, it can not be a bar except as to matters actually litigated, and as the plaintiff has made no allegations indicating what the issues were which were raised and determined, it is not a bar to any of the defenses set up in the answer. It is apparent that it could not be a bar to para-

graph 3, setting up the statute of limitations and being general and not applying to any specific defenses, it is necessarily bad.

In *Bond* v. *Markstrum*, 102 Mich. 11, the court held that in an action by the assignee of a guaranty of rent for an installment of rent, a judgment between the same parties for a former installment does not preclude defenses in the second case which might have been made in the first or which were set up in the answer in the first, but not having as a matter of fact been litigated and passed on in the first action.

Bernard v. *City of Hoboken*, 27 N. J. Law, (3 Dutch.), 412.

The chief of police of a city recovered a judgment for his salary for a certain period. Afterwards he brought a suit for salary for a subsequent period. At the trial of the second action defendant offered to show that he was legally discharged from the office before the commencement of the term for which he recovered in the first suit. *Held*, that they were not concluded by the judgment from showing this.

Lublin v. *Stewart, et al.*, 75 Fed. 294-300.

"Where in a patent infringement suit defendants did not deny the validity of the patent, but claimed a license under it to sell the patented articles and the existence of such license was the only issue litigated. *Held*, that the decision in favor of complainant did not estop defendants from questioning in a subsequent suit the validity of the patent." (Syl.)

The court said:

"And the insistence of the complainant is that from this judicial determination by the court arises an estoppel, operative against the present defend-

ants, which bars their right to question the validity of the letters patent. It may be taken as settled that a judgment at law or in equity is a bar only as to matters actually litigated, or which ought to have been litigated, in the suit; that is the matters actually in issue are forever settled, so far as the parties and their privies are concerned. But further than this the principle of estoppel does not obtain. The 'matters in issue' may be fairly well defined as 'that ultimate fact or state of facts in dispute, upon which the verdict or finding is predicated.' *Smith* v. *Ontario,* 4 Fed. 386. Now, the record in the case in New York shows very clearly that the validity of the letters patent here involved was, by the defendants there, not contested in any way. The defendants were charged, indeed, in that suit, with infringement, but, admitting the validity of the patent, they claimed a license to sell the stays in question from one who owned an interest in the patent. And this was the sole issue which was litigated. Indeed, a licensee, having accepted a license, is estopped from denying the validity of the patent in any suit in which the exercise of alleged license privileges is the basis of the controversy. Therefore the defendants were debarred from attacking in the New York suit the validity of these letters patent, even if they had been so minded. Admitting, then, that the defendants to the present suit took an active part in the defense of the suit in New York, as is alleged—so active, indeed, as to bring themselves within the binding force and effect of any decree therein made—it is evident that the only issue settled beyond peradventure was that which concerned itself with the alleged license."

Philadelphia v. *Ridge Ave. Ry. Co.,* 142 Pa. St. 484.

"The rule that a party to a judgment is estopped from relitigating questions, the decision of which was involved therein, does not extend to estop the plaintiff from setting up in a subsequent action, where the cause of action is not the same, the uncon-

stitutionality of a statute upon which the prior action proceeded." (Syl. 5.)

"Wherefore although the city, in *Philadelphia* v. *Ry. Co.*, 102 Pa. 190, claimed and recovered a judgment against the Ridge Ave. Ry. Co. for the taxes of the years 1872-1879, inclusive, at the rate prescribed by the act of 1872, it was not thereby estopped from asserting its unconstitutionality in a later suit, brought for the taxes of subsequent years." (Syl. 6.)

In *Aetna Life Insurance Co.* v. *The Commissioners*, 117 Fed. Rep. 82, it was held that where the suit is such that there is or may be a material issue or matter involved in an action between the same parties that may not have been raised and cited on the former hearing the judgment therein does not constitute an estoppel unless by pleading or proof, the party asserting it establishes the fact that the issue, right or matter in question was actually and necessarily determined in the former action.

In *Harrison* v. *Remington Paper Co.*, 140 Fed. Rep. 385, the Circuit Court of Appeals of the Eighth Circuit made the following statement of the rule:

"When the second suit is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter for every question which was or might have been presented in the former. When the second suit is upon a different cause but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action, but is not conclusive relative to any others which might have been, but were not litigated and decided." (Syl. 11 and 12.)

In *Bramlette* v. *L. & N. R. R. Co.*, 113 Ky. 300, this court held that a petition for permanent injury

to plaintiff's property by reason of stock pens being built and maintained near thereto, setting out that plaintiff "had brought a former action against defendant for erecting and maintaining a nuisance so close to her residence" and recovered a judgment thereon, does not show certainly that the first action was for the erection and maintenance of a nuisance, and for damages necessarily resulting in a proper use thereof, and not for damages resulting from an improper use, and a demurrer to the complaint on the ground that it appeared that the action was barred should have been overruled.

II

The City of Newport had no authority to levy a "license tax" upon the New York Company and has none to levy such a tax upon this Company

The annual payment of $100 required by the ordinance is defined in the ordinance as a "special license tax." Such a tax the City of Newport had no right to levy upon either the New York Company or this Company, because they had the right to do business in the City of Newport under their Federal franchises, and any attempt to tax that right was an interference with and a burden upon interstate commerce, in contravention of the interstate commerce clause of the Federal Constitution, Article 1, section 8, which provides that Congress shall "regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes;" and shall "establish Post Offices and Post Roads."

In *Leloup* v. *The Port of Mobile,* 127 U. S. 640, the court held:

"A general license tax upon a telegraph company affects its entire business, interstate as well as domestic or internal, and is unconstitutional." (Syl.)

The court, at page 645, said:

"Ordinary occupations are taxed in various ways, and in most cases legitimately taxed, but we fail to see how a state can tax a business occupation, when it can not tax the business itself. Of course, the exaction of a license tax, as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing the business is surely a tax on the business."

and again at page 647:

"But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the state. But that fact does not remove the difficulty. The tax affects the whole business without distinction. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subject to taxation, without the imposition of a tax which covers the entire operations of the company."

Norfolk & Western R. R. Co. v. *Pennsylvania,* 136 U. S. 114. In this case the court held that—

"A railroad which is a link in a through line of road by which passengers and freight are carried into a state from other states and from that state to other states, is engaged in the business of interstate commerce; and a tax imposed by such state upon the corporation owning such road for the privilege of keeping an office in the state for the use of its officers, stockholders, agents and employes (it being a corporation created by another state), is a tax upon commerce among the states, and is repugnant to the Constitution of the United States." (Syl.)

In *Lyng* v. *Michigan,* 135 U. S. 161, Chief Justice Fuller, at page 166, said:

"We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the trans-

portation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it which belongs solely to Congress."

Numerous other cases might be cited, but the latest expressions of the Supreme Court of the United States on the subject are found in the cases of *Williams* v. *City of Talladega*, 226 U. S. 404; *Barrett* v. *City of New York*, 232 U. S. 14, and *Sault Ste. Marie* v. *International Transit Co.*, 234 U. S. 333, in the former of which the court held that—

"An ordinance which taxes without exemption the privilege of carrying on business, part of which is a governmental agency, such as telegraphy, and makes no exemption of that class of the business, includes its transaction, and is void, as an unconstitutional attempt to tax a Federal agency. Where, as in this case, the part of the license exacted necessarily affects the whole it makes the entire tax unconstitutional and void." (Syl.)

The Ordinance did not impose a rental, and the annual payment can not be sustained as compensation for the use of streets

As heretofore pointed out, the ordinance does not purport to impose a rental for the use of the streets, and the annual payment is not imposed to meet any expense of regulation. It therefore follows that a charge of $100 can not be sustained upon the mere supposition that if the City had made a charge to meet expenses of regulation or as rental for its property, a reasonable charge for such purposes would have equalled this amount.

The Federal law granting to the telegraph companies the right to occupy the streets also prevented

the City from excluding them from its streets. It did not, however, provide any method for determining the compensation to be paid for such occupation or the amount to be paid to meet the expenses of regulation, leaving such matters to the state or municipalities. There is no allegation in any of the pleadings that the City has expended or was obliged to expend any money in maintaining police or other supervision over the poles or wires, and it nowhere alleges that it was put to any other expense. In the absence of any allegation that it was in fact inspecting or supervising the poles and wires, it would only be entitled to nominal compensation. The streets were there to be used for street purposes, and under the rule in Kentucky the telegraph was not an additional burden.

Cosby v. *Ry.*, 73 Ky. 288.
Cumberland Tel. & Tel. Co. v. *Avritt*, 120 Ky. 34.
Street Ry. v. *The Ry.*, 19 Am. Law Reg. (N.S.) 765, 769.
Louisville Mfg. Co. v. *Ry. Co.*, 95 Ky. 50.
Dulaney v. *Ry. Co.*, 100 Ky. 628.

The foregoing cases hold that railways, street railways and telephone companies are not additional burdens upon the use of the street. It would therefore follow *a fortiori* that a telegraph line would not be, and the rule laid down in *Postal Telegraph-Cable Co.* v. *Oregon Short Line R. R. Co.*, 114 Fed. Rep. 787, that "where the construction of a telegraph line over the right of way of a railroad will not appreciatively diminish the value of the use of the right of way for railroad purposes, the telegraph company is required to pay only nominal damages for the use of the right of way for its line," would apply.

The Telegraph Company is entitled to occupy the streets of Newport and is required to pay therefor only a nominal sum. The $100 is unreasonable on its face, as held in *Sunset Tel. & Tel Co.* v. *Medford,* 115 Fed. Rep. 202:

"An ordinance providing that a telephone company shall not occupy the streets without paying an annual license of $100 is a revenue provision (the fee being manifestly substantially in excess of enough to defray the expense of issuing license and maintaining the regulation), and is not authorized by a charter provision that the council may license telephone companies using the streets, and fix the compensation they shall annually pay for such license." (Syl.)

If the City of Newport had shown that its superintendent of public works had been inspecting the poles and wires and that it had been put to expense in doing so, it would be entitled to make a charge commensurate with that expense, but in the absence of such a showing the compensation to which it is entitled is purely nominal.

III

The State of Kentucky did not delegate to the city the right to grant to or withhold from a telegraph company permission to occupy its streets

We have heretofore called attention to section 199 of the Constitution of Kentucky conferring upon telegraph companies the right to construct and maintain lines and reserving the right of regulation to the municipalities, but nowhere *do the Constitution or laws of Kentucky require that a telegraph company shall have the consent of a municipality before constructing its lines in its streets.*

Section 163 of the Constitution provides that "no street railway, gas light, steam heating, telephone or electric lighting company shall be permitted to construct its tracks, etc., along, over, under or across the streets and alleys of a city or town without the consent of the proper legislative bodies, but telegraph companies are not mentioned, and there is no section similar to section 199 applying to any class of corporations except telegraph companies.

Section 164 of the Constitution provides:

"No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege or make any contract in reference thereto for a term exceeding twenty years, and before granting such franchise or privilege for a term of years, such municipality shall first advertise," etc.

but that section is not a grant of power to a municipality, but a prohibition and restriction upon its powers, and furthermore, as said in *Rural Home Tel. Co.* v. *Kentucky & Independent Tel. Co.,* 128 Ky. 209: "These sections of the Constitution must be read together, as the right to occupy the streets and public ways conveyed by section 163 can only be granted in the manner provided in section 164." The situation in Kentucky under section 199 of the Constitution is similar to the situation in Ohio under the statutes of Ohio with respect to telephone companies. *Farmer* v. *Columbiana Tel. Co.,* 72 O. S. 526, was an action brought by the plaintiffs as taxpayers to obtain a mandatory injunction requiring the telephone company to place a telephone instrument in their place of business, in accordance with the terms specified, and at the rates fixed by an ordinance of the City of Salem by which the company was accorded its right to erect its poles, etc.,

in the streets of the city. The Supreme Court of Ohio, after referring to the sections of the statutes governing telephone and telegraph companies, said:

"A telephone company gets its rights to go upon the streets with its poles, wires, etc., from the state (sections 3454, 3471, 3478 included), and the power of the municipal authorities in the premises is to agree upon, not the right to use, but the mode of use.

"It follows from what has preceded that the municipality possessed nothing in the way of a valuable right to bestow upon the company. Hence the promises of the company to do what it was not and could not be required to do was a naked promise without consideration. It therefore fails as a contract." (P. 532.)

In *Village of Carthage* v. *Central New York Tel. & Tel. Co.*, 185 N. Y. 448, the court at pages 452 and 453, with respect to telephone and telegraph companies, said:

"The legislature having granted these corporations the right to construct and maintain their lines upon, over or under any public roads, streets and highways, it sought to confer upon the boards of trustees of villages the power to *regulate* the *erection* of telegraph, telephone or electric light poles, or the *stringing of wires*, in, over or upon the streets, etc. It is clear that the intention of the legislature was to permit villages to regulate the erection of telegraph, telephone or electric light poles and the stringing of wires on these poles. The right to erect these poles and string the wires is not derived from the village authorities, but they are permitted to regulate the erection of the same; that is to say, the location of the poles and the streets to be occupied are, doubtless, within the reasonable power of the village to regulate."

In *Chamberlain* v. *Iowa Tel. Co.*, 119 Ia. 619, defendant's franchise had expired. It claimed the

right to remain on the streets of Des Moines by virtue of a statute which provided: "Any person or company may construct a telegraph or telephone line along the public highways of this state or across the rivers, or over any lands belonging to the state or to any private individual, and may erect the necessary fixtures therefor." The court stated the question thus: "The question here, is whether this statute gave telegraph and telephone companies the right to occupy the streets and alleys in cities and incorporated towns without authority from such cities and towns." The court held that it did and reversed the lower court's judgment enjoining the defendant from maintaining its poles, etc.

In *Western Union Tel. Co.* v. *Visalia,* 149 Cal. 744, 750, the company was on streets of city when an ordinance was passed authorizing it to erect and maintain, etc., fixing height, and providing that present location was proper. City sought to tax franchise so granted. It was practically conceded that the telegraph company had a federal franchise but the city claimed it had granted a new franchise. The court said:

"The real question, therefore, is, as before stated, does the ordinance create a franchise—and, in our opinion it does not. If it can be construed as an attempted granting of an original franchise to operate a telegraph line through the streets of the city it would be an empty form of granting what the plaintiff already had and of which the city could not deprive it. The plaintiff had that right not only from the act of Congress above referred to, but also from section 536 of our Civil Code, which provides that 'telegraph corporations may construct lines of telegraph along and upon any public road or highway.' But we do not think the ordinance purports to grant a 'franchise.' While the appellant had the right, of which the city could not deprive it, to

construct and operate its lines along the streets of the city, nevertheless it could not maintain its poles and wires in such a manner as to unreasonably obstruct and interfere with ordinary travel; and the city had authority under its police power to so regulate the manner of plaintiffs placing and maintaining its poles and wires as to prevent unreasonably the obstruction of travel. * * * Such regulation is not the granting of a franchise; it is a restriction of and burden upon a franchise already existing; it is not an original and affirmative granting of anything in the nature of a franchise."

It is a fact of common knowledge and one recognized by the people of Kentucky in the adoption of the Constitution of 1891 that the business of telegraph companies is essentially not a local business. In this respect it differs from the business of telephone companies, a large portion, and in fact, the larger portion of which is bound to be local. The people, when they adopted section 199, therefore provided that telegraph companies should have the right to construct and maintain lines of telegraph within the state without interference on the part of the municipalities but properly left to the municipalities the right to regulate the method and place of construction. By doing this, the state took away from municipalities the power to interfere with communication between their inhabitants and the inhabitants of other municipalities, and the power to interfere with or obstruct the business of telegraph companies which are important instruments of commerce, and we submit that there is no provision in the statutes or Constitution of Kentucky which authorized the City of Newport to make a grant of any kind whatever to this Telegraph Company, and having no right to bestow upon the Telegraph Company, its effort to do so, and which it is claimed

was the consideration for the implied promise of the Telegraph Company, resulted in a *nudum pactum*, and is void.

IV

The Ordinance, if enforced against Plaintiff in Error, deprives it of the equal protection of the laws in contravention of Section One of the Fourteenth Amendment to the Constitution of the United States

Said section provides that "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

Paragraph five of the answer (Rec. 16-17) contains the following allegation:

"One or more other telegraph companies have erected and maintain and were during the years 1899 to 1908 inclusive, and are now maintaining in the City of Newport a system of telegraph poles and lines, and also one or more telephone companies have used the streets and alleys of said City for its poles and wires in a manner substantially similar to the system of telegraph poles and lines owned, operated and maintained by the said New York Company and by the defendant in said City, and none of these companies, other than the defendant, is subject to the payment of any license tax similar to that attempted to be exacted from the defendant by and under the provisions of the pretended ordinance, * * * in violation of the Constitution of the State of Kentucky and of the first section of the Fourteenth Amendment to the Constitution of the United States, securing to every person within the jurisdiction of the State of Kentucky the equal protection of the laws."

The Fourteenth Amendment, although not intending to compel a state to adopt an iron rule of taxation, prevents the singling out and subjecting to

taxation a particular person or a particular class, and in this case, the City of Newport has singled out the Postal Telegraph Company of New York and attempted to levy this tax against it and is now attempting to enforce a similar payment from the plaintiff in error.

In the *Railroad Tax Cases*, 13 Fed. Rep. 722, Mr. Justice Field sitting on Circuit, said that the Fourteenth Amendment not only implied the right to resort to the courts on equal terms, but also an "exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances."

The Court of Appeals in its opinion (Rec. 35-36) cited the cases cited by counsel for defendant in error on this motion, and said:

"Cities have a right to make reasonable classifications of grants and privileges and have a right to attach similar conditions and impose similar burdens upon one class. It is only when different burdens are imposed upon persons in the same class holding under the same or similar grants that there will be a violation of the equal protection feature of the Federal Constitution. When classification is allowable, the discrimination must exist in the class to which the particular grant or privilege applies and be an attempt to impose upon the complaining party in that class burdens that are not imposed upon others in that particular class. We find no such state of facts developed in the record."

Of course, this statement is influenced by the erroneous conclusion reached by the court, that the City had power to pass the ordinance and that the New York Company accepted its terms, but nevertheless, the court's argument that the Postal belongs to one class and the Western Union to another class, when no difference is pointed out other than their

name, and when the very ordinance involved provides that "said Company * * * shall charge for sending said messages no greater rate than that charged by the Western Union Telegraph Company for similar services under like conditions" (Rec. 19), we submit is untenable.

As said in *Finley* v. *California*, 222 U. S. 28: "It is elementary that the contention" that a statute is opposed to the equal protection clause of the Fourteenth Amendment "is to be tested by considering whether there is a reasonable basis for the classification made by the statute." This rule is recognized in all of the cases cited by defendant in error.

In *German Alliance Insurance Co.* v. *Hale*, 219 U. S. 307, 319, this court said:

"The equal protection of the laws is a pledge of the protection of equal laws, to all under like circumstances."

It is difficult to appreciate the logic which will differentiate between a telegraph company whose name begins with the word "Postal" and one whose name begins with the word "Western" as to the payment of license taxes, when the authority imposing the license also provides that their tolls shall be on an equality. It is impossible to conceive of a more violent kind of discrimination than that which recognizes similarity of circumstances and situation by prohibiting one company from charging greater tolls than another company, and at the same time compels the former to pay privilege taxes not imposed upon the latter.

The language of Mr. Justice Brewer in *Gulf, Colorado & Sante Fe Ry. Co.* v. *Ellis*, 165 U. S. 150 (cited by defendant in error), at page 159, is most pertinent. He said:

"Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals and visit a penalty upon them which is not imposed upon other * * * this statute can not be sustained."

That any legislature can lawfully do such a thing has never been even dreamed, and yet that is exactly what has been done by the City of Newport. It has "arbitrarily selected one corporation" and visited "a penalty upon" it. And quoting Mr. Justice Brewer again, "The classification is not based on any idea of special privileges by way of incorporation nor of special privileges given thereby for purposes of private gain, nor even of such privileges granted for the discharge of one general class of public duties." (P. 157.)

An adaptation of the language of Mr. Justice Day in *Southern Railway* v. *Greene*, 216 U. S. 400, 412, also effectively points out the vice of the ordinance. "If the plaintiff in error is a person within the jurisdiction of the State of" Kentucky "within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and bear the same burdens as are imposed upon others in a like situation."

In *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 188, this court said:

"The inhibition of the amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent *any person* or class of persons from being singled out as a special object for discrimination and hostile legislation. Under the designation of person, there is no doubt that a private corporation is included."

This discrimination is emphasized by the decisions of the Court of Appeals of Kentucky in *Cumberland Tel. Co.* v. *Hopkins*, 121 Ky. 850, and *Adams Express Co.* v. *Boldrick*, 141 Ky. 111, holding that municipalities have no authority to levy license taxes against telephone, telegraph or express companies. This principle was laid down by the Court after its decision in the first Postal

DEFENDANT IN ERROR'S CASES

I

It is not necessary to make any further comment on the two opinions of the Court of Appeals of Kentucky.

St. Louis v. *Western Union Tel. Co.*, 148 U. S. 92, was a pole rental case, and as pointed out in an earlier part of this brief, was remanded to the circuit court for retrial, and on retrial the ordinance was declared invalid, 63 Fed. Rep. 68, affirmed by this court, 166 U. S. 388.

Postal Telegaph-Cable Co. v. *Baltimore*, 156 U. S. 110, involved a plain rental ordinance.

City of Richmond v. *Southern Bell Tel. Co.*, 174 U. S. 761, is the case in which this court held that the Post Roads Act did not apply to telephone companies.

Western Union Tel. Co. v. *Richmond*, 224 U. S. 160, involved a regulatory ordinance with a rental feature, and a comparison of that case with the case of *Essex* v. *New England Tel. Co.*, 239 U. S. 313, heretofore cited by us, shows very clearly the distinction which this court has made between attempts on the part of municipalities to regulate occupancy and an attempt to prevent occupancy or place a burden upon interstate business. None of the questions presented by this proceeding were considered or decided.

II

We have heretofore cited and quoted from *Gulf, etc., Ry. Co.* v. *Ellis*, 165 U. S. 150, and *Southern Ry. Co.* v. *Greene*, 216 U. S. 400.

Missouri v. *Lewis*, 101 U. S. 22, cited as *Bowman* v. *Lewis*, was a case which involved the question whether a citizen of one section of the State of Missouri was entitled under the Fourteenth Amend-

ment to have the same rights of appeal as the citizens of other sections of the state. This court held that:

"The true ground on which the case rests is the undoubted power of the state to regulate the jurisdiction of its own tribunals for the different portions of its territory in such manner as it sees fit." (P. 35.)

Hayes v. *Missouri*, 120 U. S. 68, was a case which involved the validity of a law allowing a greater number of peremptory challenges in capital cases in cities having a population of one hundred thousand inhabitants than it did elsewhere in the state. The court followed the former case.

Walston v. *Nevin*, 128 U. S. 578, was a case which involved the Kentucky statute of March 24, 1882, authorizing the assessment of adjoining property for opening and improving streets. The court, speaking through Mr. Chief Justice Fuller, cited *Davidson* v. *New Orleans*, 96 U. S. 97, and held that the law operated alike on all persons within the same jurisdiction and having been held valid by the Court of Appeals of Kentucky, would be upheld by this court. In the Davidson case the court said:

"Whenever the law operates alike on all persons and property similarly situated, its protection can not be said to be denied."

In *Lake Shore and Michigan Southern Ry. Co.* v. *Clough*, 242 U. S. 375, the question was this: The general railroad law of the state required railroad companies incorporated under it to bear the expense of crossings and drains over their lines and the Supreme Court of Indiana had held that the statute applied as well to new drains as to existing drains. In proceedings under a drainage statute the rail-

roads in the drainage district were required to bear the expense of the new bridges and other construction in connection with ditches crossing their rights of way and this court held that as the railways had by their charters agreed to bear such expenses there was no discrimination.

III

Point three of the brief is not a correct statement of the proposition raised by assignment of error six. (Rec. 40.)

In *Tioga Ry. Co.* v. *Blossberg, etc., Ry. Co.*, 20 Wall. 137, the parties to the case were the same as those in the prior case which was relied upon as a complete adjudication. It does not, therefore, meet the case presented on this record.

In *Minneapolis Agricultural Association* v. *Canfield*, 121 U. S. 295, the effect of the conveyance involved had been adjudged by the Supreme Court of Minnesota, and the proposition presented to this court was whether that adjudication was binding on Canfield in the Federal courts, both Canfield and the Bank being parties to both cases, although there were other parties to the Federal case not in the state court case.

In *Scotland Co.* v. *Hill*, 132 U. S. 107, the principle laid down is not at all in point, as it is one based exclusively upon estoppel *in pais*, and the law of negotiable instruments.

We respectfully submit that the record in this case presents questions involving substantial rights of the plaintiff in error under the Constitution and laws of the United States, and although calling for the application of principles well recognized by this court, those questions have not been determined by any cases heretofore decided by this court. We further

submit that they are of such importance, involving as they do a charge that is in effect perpetual, that this Company should be given an opportunity to present them fully, and that the motion of the defendant in error should be overruled in its entirety and the case take its place upon the general docket.

MORISON R. WAITE,
JOHN RANDOLPH SCHINDEL,
Counsel for Plaintiff in Error.

APPENDIX

OPINION OF THE COURT OF APPEALS IN FORMER CASE, BY JUDGE HOBSON

The City of Newport by an ordinance of December 5, 1895, granted to the Postal Telegraph-Cable Company the right to use the streets and alleys of the City for the purpose of erecting its poles and stringing its wires, and it was provided in the ordinance that the Company should pay the City a license tax of one hundred dollars per annum. This suit was filed on September 9, 1899, by the City against the Company; it was alleged in the petition that the defendant secured from the plaintiff the use of its streets for the purpose named, by the ordinance referred to; and that thereunder the defendant had erected its poles and strung its wires in the streets and alleys of the City and had since enjoyed the rights and privileges granted to it and had thereby accepted the ordinance, but that in disregard of its contract it had failed to pay the City the one hundred dollars due for the year ending December 5, 1897, or for the year ending December 5, 1898. A copy of th ordinance was filed with the petition as an exhibit and judgment was prayed for the two hundred dollars due. The defendant filed an answer in which it admitted the passage of the ordinance, but denied that it thereby acquired the right to use the streets and alleys. It alleged that by the ordinance it was provided in substance that if the Company failed within thirty days after the approval of the ordinance to signify to the general council its acceptance of the grant in writing subject to the limitations therein set out, then all the rights and privileges granted should become null and void, and of no effect. It alleged that it did not accept in writing or otherwise the provisions of the ordinance, but it admitted that shortly after the passage of the

ordinance it began the erection of its poles and the stringing of its wires in and over the streets and alleys of the City and has since operated its system thereon. Further answering, the defendant alleged that on March 17, 1886, it accepted the Act of Congress approved July 4, 1866, entitled an "act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," and the acts amendatory thereof, and that by the statutes of the United States it thus acquired the right to construct and operate its lines over and along all military and post roads of the United States, and that all public roads and highways and all letter carrier routes established in any city or town for the collection and delivery of mail were by these statutes declared post roads; that all the streets and alleys of the City of Newport are such post roads and that it had erected its poles and strung its wires therein under the acts of Congress and that it voluntarily submitted to such provisions of the ordinance as related to the manner in which its poles should be erected, but not to so much of it as required it to pay one hundred dollars a year; that it paid its taxes as other taxpayers; that other companies are using the streets just as it is using them without being required to pay one hundred dollars a year; that there was no consideration for the alleged contract which made an unreasonable discrimination between the defendant and other telegraph companies, and was in violation of the interstate commerce clause of the United States Constitution and the act of Congress on the subject of post roads. The court sustained a demurrer to the answer after it had been several times amended, and, the defendant failing to plead further, entered judgment in favor of the plaintiff.

A reversal is sought in this court on the ground that under the denials of the answer the ordinance

can not be treated as a contract, but only as a license tax which is void under the United States Constitution as a restriction on interstate commerce, and also void under the State Constitution because unreasonable and not uniform.

The Congress of the United States has no power to take private property for public purposes without compensation, and it can no more take the property of a state or one of its municipalities than the property of an individual. The acts of Congress, referred to in the answer, conferred on the *defendant no right to use* the streets and alleys of the City of Newport, which belonged to the municipality. This was expressly held in *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92, and *Postal Tel. Co.* v. *Baltimore,* 156 U. S. 210. The acts of Congress are only permissive so far as the rights of the Federal Government go. The defendant entered on the streets soon after the ordinance was passed and constructed its system. It had no authority to do so, except under the ordinance. Its action was an acceptance of the ordinance in the absence of some expressed disclaimer, which is not alleged. Its failure to accept the ordinance in writing might be waived by the City, and this waiver may be implied from its acquiescence in the defendant's acts. Besides, the ordinance which was made a part of the petition, a copy of it being filed therewith, is not copied in the transcript, and it must be presumed it sustained the judgment rendered on this point.

This is not the case of a license tax imposed on a telegraph company already in the use of the streets and alleys of the City. The defendant entered the City and got the use of the streets and alleys by virtue of the ordinance and it took its rights subject to the charge which the City made for the grant. The question of the reasonableness of the grant was

for the parties to decide. If the defendant was not satisfied with the terms of the grant it could have refused to accept it. It is not material now how many poles the defendant set up; the City took its chance on these things and fixed a lump sum. The defendant in going ahead under the ordinance also took its chance, and it can not be heard to say now that the charge was too high. The poles and wires in the street are a serious servitude and, although the defendant was a foreign corporation and engaged in interstate commerce, it could not impose this servitude upon the City, thus taking its property without compensation. What was a fair compensation for the servitude was a question for the parties to decide. The contract was not without consideration, nor is it to be construed as imposing a license tax and therefore the case does not fall within the line of decisions to the effect that a state can not impose any burden upon interstate commerce within its limits under the guise of a license tax.

This also disposes of the objection that the ordinance is void under the Constitution and laws of the State of Kentucky on the ground that municipal corporations are without power to exact license taxes from some and not from others engaged in the same business. It is not alleged that the City has admitted any other company to use its streets without compensation. The other companies referred to in the answer for all that appears therein may have acquired their rights on other terms and before the adoption of the present Constitution. There is nothing, therefore, to show any discrimination. No other questions are made, and on the whole case we are of the opinion that the court properly sustained the demurrer to the answer.

Judgment affirmed.

POSTAL TELEGRAPH CABLE COMPANY *v.* CITY OF NEWPORT, KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 273. Argued January 18, 21, 1918.—Decided June 10, 1918.

This court will review and correct the error of a state supreme court, in assuming a state of facts without any support in the record as a basis for denying asserted federal rights.

When the case has been disposed of on the pleadings, every uncontradicted allegation by the unsuccessful party must be taken as true, including denials of material facts previously averred by his opponent.

The sole ground upon which a judgment against a prior owner is conclusive against his successor in interest is that the estoppel runs with the property, that the grantor can convey no better right or title than he had himself, and that the grantee takes *cum onere*.

Hence, a judgment holding a telegraph company bound by a license agreement with a city touching the use of the streets, but rendered in a suit begun after the company had conveyed to another, does not estop its remote successor in interest from claiming against the city that the agreement was never accepted.

While *res judicata* ordinarily is a matter of state law, a decision of the state court which denies asserted federal rights through the application of a former judgment will not conclude this court, if such application be clearly inconsistent with the right to due process of law.

It is a violation of the due process of the Fourteenth Amendment for

a State to give conclusive effect to a prior judgment against one who was neither a party, nor in privity with a party, therein.
160 Kentucky, 244, reversed.

THE case is stated in the opinion.

Mr. John Randolph Schindel, with whom *Mr. Morison R. Waite* was on the briefs, for plaintiff in error.

Mr. Brent Spence for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

On December 5, 1895, the council of the City of Newport, Kentucky, passed an ordinance purporting to grant to the Postal Telegraph Cable Company and its successors, subject to certain limitations, the right and privilege of erecting poles and stretching wires over the streets and alleys of the city necessary to the establishment, operation, and maintenance of a telegraph system connecting that city with other towns and cities. Among its provisions were these: (a) that unless the company should within thirty days, and in writing, accept the grant subject to the limitations, the grant should become void; (b) that nothing in the ordinance should be construed as granting a franchise to the company; and (c) that the company should pay to the city a "special license tax" of $100 per annum. This company was a New York corporation having the same name as that of plaintiff in error, and will be referred to hereinafter as the first New York company.

On or about January 1, 1897, that company conveyed its property in the State of Kentucky, including all its rights and interests in the City of Newport, to another New York corporation known as the Commercial Cable Company; in 1898 this company conveyed the same property and privileges to another New York corporation

known as the Commercial Cable & Telegraph Company; and on or about December 31, 1900, all of said rights and property were transferred and conveyed by the latter company to the plaintiff in error, the Postal Telegraph Cable Company, which is a corporation of the State of Kentucky, and since then has owned and operated the property.

In 1908 suit was brought in a state court by the city against plaintiff in error (hereinafter referred to as defendant) to recover "license taxes" as specified in the ordinance for a series of years, and a judgment in favor of the city for the years 1903 to 1907 inclusive was sustained by the Court of Appeals of Kentucky, notwithstanding certain contentions of defendant based upon the provisions of the Constitution of the United States respecting the regulation of commerce among the States and the establishment of post offices and post roads (Art. 1, § 8, pars. 3 & 7), upon the Act of Congress of July 24, 1866 (c. 230, 14 Stat. 221; Rev. Stats. U. S. § 5263 *et seq.*) and upon the "equal protection" clause of the Fourteenth Amendment. 160 Kentucky, 244. A writ of error under § 237, Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1156), issued before the taking effect of the Act of September 6, 1916, c. 448, 39 Stat. 726, brings the judgment here for review.

The case was decided upon the pleadings and exhibits, which latter included a copy of the ordinance and what was treated as a transcript of the record of a previous suit brought by the city against the first New York company in a state court of Kentucky to recover license taxes under the ordinance for two years ending December 5, 1898, resulting in a judgment in favor of the city, which was affirmed by the Court of Appeals, opinion reported in 25 Ky. Law Rep. 635; the judgment being pleaded as a bar to the defense set up in this action.

The pleadings in the present suit are so involved and

prolix that a particular recital of them would be tedious. We will present a sufficient summary to show the questions raised and how they were disposed of.

The city alleged the passage of the ordinance, and averred that shortly after its passage and in pursuance of it the first New York company erected poles and strung wires in the streets, and established, operated, and maintained a telegraph system in the city, and thereby the ordinance became a binding contract between the city and the company; but that defendant had failed and refused to pay the sum of $100 per annum for the several years in question, in disregard of its contract.

Defendant's answer alleged that at the time of the enactment of the ordinance defendant was not in existence, and that the Postal Telegraph Cable Company therein referred to was the first New York company; denied that either that company or defendant in any manner or at any time accepted the ordinance, or that the same became a binding contract between plaintiff and either company; admitted that shortly after its passage the first New York company began the erection of its poles and wires and the establishment of its telegraph system, but denied that this was done under or by virtue of the ordinance; alleged on the contrary that that company did not accept but declined to accept the ordinance, as plaintiff well knew, and that the poles were erected and wires strung in and over the streets and alleys of the city by the company under another and independent claim of right, as plaintiff well knew; that that company had accepted the Act of Congress approved July 24, 1866, c. 230, 14 Stat. 221; Rev. Stats. U. S. § 5263, *et seq*, and acts amendatory thereof, and had complied with their terms, and thereby obtained the right to construct, maintain, and operate its lines of telegraph over and along all post roads of the United States; that under § 3964, Rev. Stats. U. S., and the Act of Congress of March 1, 1884, c. 9, 23 Stat. 3, all

the streets and alleys of the City of Newport were such post roads, and by virtue of these provisions of the laws of the United States said New York company was entitled to erect its poles and string its wires over and along the streets and alleys of the city, and did so under that authority and not in pursuance of any acceptance of the ordinance, nor under any contract with the city.

Partly in an amendment to the answer, and partly in a rejoinder filed at the same time in response to plaintiff's reply, defendant set up the conveyance by said New York company on or about January 1, 1897, of all its property, rights, and lines of telegraph in the State of Kentucky and elsewhere, including its rights over the roads, streets and alleys in said State and in the various cities and municipalities thereof, to the Commerical Cable Company, a corporation of the State of New York; set up the subsequent conveyances of the same property as we have recited them, terminating with the conveyance to the defendant on or about December 31, 1900; alleged that from January 2, 1897, until June 30, 1898, the Commercial Cable Company of New York operated the Kentucky lines in the name of the Postal Telegraph Cable Company of New York; that from June 30, 1898, until December 31, 1900, the Commercial Cable & Telegraph Company of New York did the same; and that since the last mentioned date defendant had owned and operated and still owned and operated said lines, and was entirely separate and distinct from the first New York company and had no relations with it; that since the last mentioned date defendant had been engaged in operating and maintaining a system of telegraphy in the State of Kentucky between cities and towns in that State and, in connection with other companies, between various other cities and towns in other States; that before the last mentioned date defendant had accepted the Act of Congress of July 24, 1866, and had complied with its terms and ever since had been subject

thereto, and thus had obtained the right to construct, maintain, and operate its lines of telegraph over the streets and alleys of the City of Newport, and was doing so pursuant to this right and not by virtue of any contract with the city.

Defendant in its answer further set up that the payment of $100 per annum mentioned in the ordinance was not imposed as a rental but as a special license tax; and that it was not a reasonable rental or a reasonable or lawful exaction as a license tax. Also that the ordinance was void and inoperative because said right and privilege was not conferred in accordance with § 164 of the constitution of the Commonwealth of Kentucky then in force, and § 3068, Kentucky Statutes. And also that the alleged contract was beyond the powers of the city, *ultra vires*, and void.

Defendant further alleged that other telegraph companies and telephone companies were using the streets and alleys of the city for poles and wires in a manner substantially similar to their use by the first New York company and by defendant; that none of these companies was subject to the payment of any license tax or was required to pay or agreed to pay any compensation to the city by way of rental, license, or otherwise; that the attempted exaction from defendant of $100 per annum was an unreasonable discrimination between defendant and other telegraph and telephone companies, contrary to the laws of the State of Kentucky and in violation of the constitution of that State, and also in violation of the first section of the Fourteenth Amendment to the Constitution of the United States; and also that it was an unreasonable, excessive, and unlawful exaction, in violation of those provisions of the Constitution of the United States conferring upon Congress the power to regulate commerce among the States and to establish post-offices and post-roads (Art. 1, § 8, pars. 3 & 7), and the laws

enacted in pursuance thereof, and was therefore null and void.

In what was entitled a "second amended petition," but was ordered by the court to be taken as a reply to defendant's answer, plaintiff set up in substance that in a suit brought by it against the first New York company on September 9, 1899, the city alleged that the ordinance of December 5, 1895, was a contract consented to by that company and under which it derived and enjoyed its privilege to erect poles and string wires in the streets and alleys of the city and establish and maintain a telegraph system therein, that in consideration of this right and privilege the company agreed to pay to the city the sum of $100 per year as specified in the ordinance, and that under its terms $200 was due to the city for two years ending December 5, 1898, for which recovery was prayed; and that in this action a judgment was rendered in the trial court in favor of the city for the amount claimed, which was affirmed by the Court of Appeals of Kentucky, its opinion being reported in 25 Ky. Law Rep. 635. The same pleading alleged that the Postal Telegraph Cable Company of Kentucky, defendant in the present action, was the same Postal Telegraph Cable Company that was organized under the laws of the State of New York and was defendant in the former action, or that defendant was the lessee or successor, and succeeded to all the rights, privileges, and duties of the defendant in the former action, and was using, operating, and controlling the same poles, wires, and equipment as those used, operated, and controlled by the defendant in the former action; and plaintiff pleaded said proceedings and judgment as a bar to the defense set up in the present action.

By way of rejoinder, defendant denied its identity with the Postal Telegraph Cable Company of New York, defendant in the former action, denied that defendant in

the present action was the lessee or successor of said company or had succeeded to all its rights, or to any of its rights under the ordinance, and denied that it had succeeded to any of the duties of said New York company. In the same pleading were the averments respecting its acquisition of title to the property, its operation thereof, and its want of relation with the New York company, which we have recited.

The Court of Appeals, in disposing of the case (160 Kentucky, 244), laid aside the questions that were raised under both state and federal law as to the validity and effect of the ordinance, including the authority of the city to grant the privilege or exact the tax, upon the ground that the first New York company had agreed to the ordinance, and it and its successors, including defendant, had since been in possession of the streets under and by virtue of it, and would not be heard to dispute its validity while thus occupying the streets. Referring to the statement in the ordinance that it was not to be construed as granting a franchise, the court said: "Doubtless it was well known that a franchise such as is contemplated and required by the [state] constitution could not be secured in this way. In accepting the use of the streets under this ordinance, the company merely obtained the right, for the stipulated compensation, to occupy the streets until such time as the city might see proper to revoke the license. But so long as the company occupies the streets under the license it must pay the agreed price. The compensation provided by the ordinance is not a license tax upon the right of the company to do business in the city, but merely a charge against the company for the use of the streets with its poles and wires." The contention that the exaction of $100 per annum for the use of the streets was unreasonable was passed by a reference to the previous decision, where it was held (25 Ky. Law Rep. 637) that the question of the reasonableness of the grant

and what was a fair compensation for the servitude was a question for the parties to decide. Finally, the contention that the enforcement of the ordinance denied to defendant the equal protection of the laws was rejected upon the ground that it did not appear that any other telegraph company was occupying the streets of Newport under a grant like the one conferred by the ordinance in question; the court declaring that a corporation accepting a privilege under one grant cannot complain that other corporations are occupying the streets under different grants imposing other conditions, and that cities may make reasonable classifications of grants and privileges, and attach dissimilar conditions and impose dissimilar burdens upon each class, without violating the equal protection feature of the Federal Constitution.

It will be observed that every point raised by defendant, whether of fact or of state or federal law, was held immaterial upon the ground that (a) the first New York company had accepted the grant subject to the payment of the charge of $100 per annum; (b) its liability to pay the same had been adjudicated in the former suit; and (c) defendant, as successor to the rights and privileges of that company, was concluded by the former judgment against it.

It is true that, in answer to the assertion of a right under the Act of Congress of July 24, 1866, to erect poles and string wires in the streets without the consent of the city, the court declared that the act did not take from the city the right to charge a telegraph company for using its streets a reasonable compensation in the way of a license fee or occupation tax, citing *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, and *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160. In each of these cases, however, it was assumed, in the absence of anything to the contrary, that under the state constitution and laws the municipality represented the public in the control of

the streets (148 U. S. 100; 224 U. S. 171); in the *St. Louis Case* it was so held upon rehearing (149 U. S. 465); in both cases it was held that the question of reasonable compensation was a question of fact, to be determined in the usual way (148 U. S. 104–105; 224 U. S. 171–172); and in the *St. Louis Case*, upon a retrial, the ordinance charge was found to be unreasonable in fact (166 U. S. 388, 391). But in the present case, both the power of the city under the constitution and laws of the State, and the reasonableness in fact of the charge of $100 per annum, were denied by defendant, and the court declined to pass upon either question, deeming that defendant was concluded upon both points by the consent of its predecessor.

We assume that if the first New York company did at the outset accept the ordinance, either in writing according to its terms or by erecting poles and wires and occupying the streets thereunder or in any other manner satisfactory to the city, that company and its successors in the ownership of the telegraph system, including defendant, were bound to comply with the terms of the ordinance as to the "special license tax" (which evidently in that case would be regarded as an agreed rental), so long as they continued to retain and enjoy the privileges conferred; that in that event every claim of federal right here asserted would be without foundation; and that, if the fact of acceptance had been conclusively adjudged in a former proceeding against defendant or its privy, the same result would follow.

But the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted federal rights has any support in the record; for if not, it is our duty to review and correct the error. *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611; *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 259; *Carlson* v. *Curtiss*, 234 U. S. 103, 106; *Norfolk & Western Ry. Co.* v.

West Virginia, 236 U. S. 605, 610; *Interstate Amusement Co.* v. *Albert*, 239 U. S. 560, 567.

Since the case proceeded to judgment upon the pleadings, it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true. This applies to the denial by defendant that either it or the first New York company accepted the ordinance, the averment that the latter company declined to accept it and erected its poles and strung its wires in the streets of the city under another and independent claim of right as plaintiff well knew, and other averments bearing upon the question of acceptance in fact.

There remains only the adjudication in the former suit against the first New York company, which we assume to have been sufficiently pleaded, and to have substantially involved the points that are now material so as to make them *res judicata* in a subsequent suit between the parties and their privies although based on a different demand (*Cromwell* v. *County of Sac*, 94 U. S. 351, 352; *Wilson's Executor* v. *Deen*, 121 U. S. 525, 534; *Nesbit* v. *Riverside Independent District*, 144 U. S. 610), and which the Court of Appeals regarded as concluding defendant upon matters of fact as well as law. But there is nothing in the record to make this judgment conclusive as against defendant except upon the theory of a privity of estate between it and the first New York company. And, as to this, it appears from the averments in defendant's pleadings—indeed, it is stated as a fact in the opinion of the court—that the suit against that company was brought in the year 1899, two years after it had conveyed its property in the State of Kentucky, including all its rights and interests in the City of Newport, to another corporation through which defendant afterwards acquired title.

The ground upon which, and upon which alone, a judgment against a prior owner is held conclusive against his successor in interest, is that the estoppel runs with the

property, that the grantor can transfer no better right or title than he himself has, and that the grantee takes *cum onere*. From this it follows that nothing which the grantor can do or suffer after he has parted with the title can affect rights previously vested in the grantee, for there is no longer privity between them. This doctrine is universally accepted, and was applied by this court in *Keokuk & Western R. R. Co.* v. *Missouri*, 152 U. S. 301, 314; *Keokuk & Western R. R. Co.* v. *Scotland County*, 152 U. S. 318, 322; *Dull* v. *Blackman*, 169 U. S. 243, 248; *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 122. We infer that its obvious application to the facts of this case was inadvertently overlooked by the Court of Appeals, because the general principle is recognized in previous decisions of that court as a limitation upon the doctrine of *lis pendens*. *Clarkson* v. *Morgan's Devisees*, 45 Kentucky (6 B. Mon.), 441, 446, 453; *Parks* v. *Smoot*, 105 Kentucky, 63, 67.

Res judicata, like other kinds of estoppel, ordinarily is a matter of state law, and as the decision of the state court in this case in effect rests upon that ground, this of itself would be sufficient to sustain the judgment against reversal in this court, except for two queries that must first be answered: (a) Is the question of state law, in this case, independent of the federal questions? and (b) Is the decision reached upon that point sufficiently well founded to furnish adequate support for the judgment? *Eustis* v. *Bolles*, 150 U. S. 361, 366; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 610; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164.

Waiving the doubt whether, under the particular facts of this case, the question of *res judicata* can be regarded as independent of the federal questions that were raised, we are of the opinion that the decision reached upon it is so clearly ill founded that it cannot sustain the judgment;

and this for the reason that it is inconsistent with another federal right of defendant, fundamental in character.

The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48; Greenleaf Ev., §§ 522–523. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. *Windsor* v. *McVeigh*, 93 U. S. 274, 277; *Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230, 236; *Simon* v. *Craft*, 182 U. S. 427, 436. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (*Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Scott* v. *McNeal*, 154 U. S. 34, 46; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 423), so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

It follows that in this case *res judicata* cannot be regarded as an adequate support for the judgment; and since, without that, we have not the materials necessary for a proper disposition of the federal questions that were raised, we express no opinion upon them.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.